Supreme Court, U.S.
FILED
JAN 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

86-1213

NO. 87-

IN THE

Supreme Court of the United States

October Term, 1987

ARNALDO JIMENEZ-FUENTES, HIS WIFE OLGA OSORIO AND THEIR CONJUGAL PARTNERSHIP AND JOSE VICENTE VAZQUEZ, HIS WIFE CELESTINA ALMODOVAR, AND THEIR CONJUGAL PARTNERSHIP

Petitioners

v.

HON. JAIME TORRES GAZTAMBIDE, AS SECRETARY OF HOUSING OF THE COMMONWEALTH OF PUERTO RICO, AND IN HIS PERSONAL CAPACITY, HIS WIFE MRS. CARMEN GLADYS VINCENTY, AND THEIR CONJUGAL PARTNERSHIP; ROLANDO QUEVEDO DEL RIO, AS EXECUTIVE DIRECTOR OF THE HOUSING AND URBAN DEVELOPMENT CORPORATION, AND IN HIS PERSONAL CAPACITY, HIS WIFE MRS. GINNY MOTTA, AND THEIR CONJUGAL PARTNERSHIP.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX TO PETITION FOR CERTIORARI

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January 20, 1987

PUBLISHING RESOURCES, INC SAN JUAN, PUERTO RICO

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ARNALDO JIMENEZ FUENTES, et al. *Plaintiff* *vs.* **HON. JAIME TORRES GAZTAMBIDE, et al.,** *Defendants*	CIVIL NO. 85-1110 (RLA)
JOSE VICENTE VAZQUEZ, et al., *Plaintiffs* *vs.* **HON. JAIME TORRES GAZTAMBIDE et al.,** *Defendants*	CIVIL NO. 85-1225 (RLA)

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE RAYMOND ACOSTA,
DISTRICT JUDGE, held August 6, 1985,
at San Juan, Puerto Rico

OPINION AND ORDER

THE COURT: Good afternoon. I will now proceed to give my opinion and order in this case.

The Plaintiffs, Jimenez Fuentes and Vicente Vazquez-Pena, instituted these proceedings for dismissal from their positions as Regional Directors of the Puerto Rico Housing Development Corporation, otherwise known as CRUV, at the Caguas and San Juan II Offices respectively, due to alleged political discrimination in violation of their Constitutional Rights.

In order to save time and expense, these two actions were consolidated for the preliminary injuction hearing since most of the essential evidence in both cases was identical.

After hearing the testimony of the numerous Witnesses presented by all parties and after careful review of the evidence presented in these proceedings, the Court hereby finds as follows:

1. Plaintiffs were removed from their positions by Defendants Jaime Torres Gaztambide and Quevedo del Rio, by letters dated March 20 and March 18, 1985 respectively.

2. The only grounds for the dismissal given in the letter was that Section 5.10 of the Public Service Personnel Act established that "the trust employees shall be of free selection and removal."

3. In November 1984, the PNP, the party in power for the past 8 years lost the election to the PDP.

4. The PNP advocates Statehood, whereas the PDP's political philosophy is geard[1] towards more autonomy under the concept of a commonwealth or as the term is literally translated, a free and associated state.

5. Defendants, members of the PDP, were appointed by the incoming party within the first two months of 1985.

6. Plaintiffs are members and active participants of the PNP, and were appointed to their positions by the past PNP administration.

At the time of their removal, Jimenez Fuentes salary was $1,642 per month, and Vazquez Pena's salary was $1,845 per month.

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[1] Opinion and Order given from the Bench and transcribed by the Court Reporter contains a number of typographical errors. It has been printed exactly as handed down by the Court.

Plaintiffs bear a heavy burden in proving their case. Discrimination is a state of mind, and by its very insidiousness is difficult to establish. It is very seldom that a Defendant will readily admit to his violation of Constitutional rights or in any way manifest his discriminatory animus either orally or in writing.

Because of this situation, Defendants must necessarily rely exclusively on circumstantial evidence to establish a subjective condition.

The Court finds that the proximity in time between the appointment of the Defendants and the dismissal of the Plaintiffs is indicative of an underlying political motive: Particularly when there is unrefuted evidence that the Plaintiffs were active PNP partisans.

Plaintiff Jimenez Fuentes was the Assistant Political Auditor of the PNP mayor of Juncos, whose function was to assist the mayor in all that was needed to carry out campaigns.

Plaintiff Vazquez Pena was the PNP Coordinator of the Electoral Unit and Secretary of the Association of Pro-Statehood Engineers and had directed the campaign of one "Chito" Ojeda, as Senator, for the District of Carolina.

Defendant Quevedo, the only Defendant to testify at the hearing, stated that he did not know the political affiliations of the Plaintiffs when they were dismissed by him, after admitting under cross examination that a Regional Director has to be a member of the PDP. The Court has the choice of believing that either the Defendant Quevedo does not adhere to his own claim that political affiliation is an appropriate requirement for the effective performance of the public office involved or that he knew of the Plaintiffs political affiliations. The Court chooses the latter.

Furthermore, it is to be noted that at no time prior to their removal were Plaintiffs ever apprised of any allegation of wrong doing or incompetency in the performance of their functions, nor had they ever been admonished or disciplined for these reasons.

With respect to Defendants power to remove the Plaintiffs at will, the Defendants made references as stated to Section 5.10 of the Public Service Personnel Act, the OP 16 which sets forth the duties and functions of the Regional Director and the personnel regulations of CRUV.

The Court agrees with Defendants' argument that in posi-

tions of trust, employees may be removed at will and without cause. However, the Constitution provides as an exception to this general rule that the basis for the termination cannot be political affiliation unless said requirement is necessary for the effective, performance of the public office involved. Here I am citing for the record Branty v Finkle, 100 S. Ct, 1287, 1293 (1980); Barnes v Bosley, 745 F2d 501 and 505; Tanner v McCall, 625 F2d 1183.

With respect to the Defendants' claim that the Plaintiff's political affiliation is an appropriate requirement for the effective performance of their public office, Defendants presented the testimony of their expert, Dr. Jack Hirsbrunner, who conducted a study of the organization and functions of the various levels of CRUV and concluded that political affiliation was indeed an appropriate criteria to secure the effective performance of a particular administration's goals.

The Court, after listening to the testimony and observing the demeanor of Dr. Hirsbrunner, gives no weight to his conclusion. In substance, Dr. Hirsbrunner was of the opinion that the ideological differences between the PNP, which favors Statehood, and the PDP, which favors autonomy, gives rise to conflicting philosophical approaches to the programs and functions of the Agency. It was his opinion that this philosophical conflict translates into a, "hindering" or "fostering", of a particular program of the administration in power, and that since the office of Regional Director acts as a pipeline between the clientele, which of course are the housing applicants, and the Administration or Agency heads, the Regional Directors should be an advocate of the program. Hence, he should be a member of the party in power. Dr. Hirsbrunner gave, as an example of differing philosophical approaches, the possible preference of an administration to the Government taking a more active role in administering properties or public services, and another Government possibly favoring private industry taking over these functions.

Another example that he cited, was of one Government favoring the utilization of federal funds while another would prefer greater utilization of local 936 funds.

Dr. Hirsbrunner, after questioning, failed to convice the Court that the political affiliation is more appropriate to the simple expediency of disciplining or removing an employee who fails to abide by an Executive Order which reflects the program of

the Administration regardless of the employee's political affiliation.

The Court does agree and give credence to the testimony of Jorge Guillermety former Associate Director of Public Housing, who stated that any one with an Engineering, Public Administration or Social Services Degree can qualify as a Regional Director and that political affiliation is not a requisite as the function and perimeters to do the job are clearly and specifically set forth in the rules and regulations of the Agency.

It would seem therefore, that there is little discretion involved in the position of Regional Director. Hence there would be very little margin for program interference due to political differences between the Regional Director and the Agency Heads, who are primarily responsible for carrying out clearly defined regulations and guidelines in furtherance of the Administration's programs and goals.

Any departure therefrom by a particular Director, be it due to political beliefs or mere incompetence can be readily ascertained and dealt with following the pertinent administrative procedures.

Now, with respect to the wrongdoing and incompetency of the Plaintiffs, the Defendents presented evidence of the tenants accounts receivable performance, which will be hereinafter referred to as Tar for the Caguas and San Juan II Regional Offices from March 1984 to February 1985 which were headed by the Plaintiffs.

Also presented by the Defendants was testimony of various Witnesses testifying concerning the hiring of Plaintiff's, Jimenez Fuentes' son and daugher, as summer irregular or part-time employees at the Regional Office and alleged irregularities with respect to overlapping dates of employment and questioned signatures.

In addition, Defendants presented testimony concerning, or attempted to present testimony concerning an auto accident involving the Plaintiff Jimenez Fuentes under suspicious circumstances.

With respect to Vazquez Pena, the Defendants attempted to show that he had made improper inquiries of a Mr. Rondon as to whether applicants for housing were members of the PNP, the Court gives no weight or credence to this testimony and considers

it to be irrelevant and excludable for the following reasons.

First, Defendants admit that although they had indications of wrongdoing, the Plaintiffs were removed before they received the results of any investigation and that indeed there are still ongoing investigations. In other words, at the time of the Plaintiffs dismissal, the Defendants had no grounds for their removal on the basis of the wrongdoing that they are now attempting to show at this preliminary injuction hearing.

Second, the Court gives no weight or credibility to the testimony of Mr. Paul Carton, the Special Assistant to the Secretary of CRUV. Mr. Carton testified that the TAR, which you will recall is the tenants accounts receivable performance ratings, the TAR deficiencies, he testified were "horrible" and that because of this condition, CRUV was in jeopardy of loosing millions of dollars of federal subsidies.

However, Mr. Carton admitted, that although he was specifically hired to come up with solutions, and make recommendations to the Secretary for dealing with this problem, his studies were not yet completed.

Furthermore, he stated, and I quote, "we are going to bring in a series of consultants to see what they are doing in New York, to make the problem better". Mr. Carton concluded that solving the TAR problem is a, "process which is still unfolding" and that he was "currently looking at various techniques" for correcting the situation.

Mr. Carton specifically acknowledged that the problem is still being studied for presentation of a solution, and that at no time had he made a suggestion or recommendation to the Secretary, as to either a short or long term solution to remove the Plaintiffs as Regional Directors.

The Defendants content that under the standard applied in the Mt. Healthy City School District v Doyle case, and I am going to cite it for the record, 97 S. Ct 568 (1977), that the Plaintiffs can not prevail in these proceedings because the Defendants would have been dismissed even in the absence of the alleged protected conduct. In Barnes v Bosley, at 745 F2d at 507, the Court found the Mt. Healthy standard is appropriate in cases where the protected conduct is party affiliation and mixed motives are alleged.

The situation that is before the Court today is quite different,

in that the non-discriminatory reasons alleged for the dismissal were not known to the Defendants at the time the termination took place.

Mt. Healthy presupposes the alternate grounds for the challenged action were known and considered at the time the decision at issue was taken. Where pertinent, it reads, "whether the Board had shown by a preponderance of the evidence that it would have reached the same decision, even in the absence of the protected conduct". Mt. Healthy, 97 S. Ct 576.

This does not imply that information gathered after the dismissal may then be used to justify uncontitutional conduct, a posteriori which is what the Defendants attempted to do in these proceedings.

Based on the foregoing, the Court rejects Defendants alleged non-discriminatory justification for the dismissals. The Court finds that at the time the letters of separation were delivered, the Defendants had no basis for removal of Plaintiffs on grounds of wrong doing.

In order for Plaintiffs to prevail in their preliminary injuction request, they must comply with the following elements:

1. That they will suffer irreparable injury if the injuction is not granted.
2. That such injury outweighs the harm that would befall Defedants should the injuction be granted.
3. Plaintiffs have shown a likelihood of success on the merits.
4. That the public interest will not be adversly affected by the granting of the injuction.

Again, for the record, I am citing Tremblay v Marsh, 750 F2d 3, At 5, (1st Cir., 1984); Libertarian Party of Indiana v Packard, 741 F2d, 1981 At 1984, (7th Cir. 1984); Planned Parenthood League of Massachusetts v Bellotti, 641 F2d 1006, 1009, (1st Cir. 1981).

It is not always easy to discuss each one of these factors independently of each other, since, and I quote from the Libertarian Party case, "the merits of a dispute often are intertwined with the other three factors to be considered in the decision to issue or deny a preliminary injuction". Libertarian Party 741 F2d at 985.

There is no controversy in the cases at Bar that Plaintiff's

contitutional rights have been violated, and that such laws, even for a brief period, constitutes irreparable injury. Again quoted from Libertarian Party case, 741 F2d at 985.

Defendants have attempted to convice the Court that the harm to Plaintiffs would not outweigh the harm that would befall the Defendants if the Court were to grant the preliminary injuction in light of the various investigations that are ongoing with respect to the Defendants incompetency and wrongdoing.

The Court finds that protection of the Plaintiffs' constitutional rights outweighs any harm that could be visited upon the Defendants.

The reason for this is that, even after reinstatement, the Defendants are at liberty to institute the appropriate administrative proceedings, should they have adequate non-discriminatory gounds for the removal of the Plaintiffs herein.

And I should add, to institute immediate appropriate administrative proceedings.

Based on the findings of descrimination made by the Court today, we are convinced that the Plaintiffs have met their burden in establishing their likelihood of success on the merits.

The public interest in the efficient performance of public functions cannot be equated with allowing a political party total license to appoint employees of their political leanings to positions of trust, or a blank license.

There is also a public interest in the protection of the constitutional rights of government employees, which must be safeguarded.

Upon careful examination of the evidence presented in these two cases and the equities involved, Plaintiffs' motions for the issuance of a preliminary injuction are hereby granted.

Accordingly, it is hereby ordered that, the Defendants, their successors in office, agents, employees, and servants are ordered to reinstate the Plaintiff, Jose Vincente Vazquez to his former position as Regional Director, Puerto Rico Housing and Urban Development Corporation for the San Juan II Region, and Plaintiff Arnaldo Jimenez Fuentes, to his former postion as Regional Director of the Puerto Rico Housing Development Corporation for the Caguas Region, at the same salary and with the same fringe benefits they would be earning and receiving but for their discharge.

And the Court futher enjoins Defendants, their successors in office, agents, employees, and any other person acting on behalf or in concert with the Defendants from discharging, demoting, transferring, or in any other way affecting Plaintiffs' employment rights, based upon political affiliation, pending a hearing and determination on Plaintiffs' request for permanent injuction.

The Court Reporter is hereby instructed to forthwith transcibe the Order in full and to file in cases 85-1110 and 85-1225.

REPORTER' CERTIFICATE

I, CECIL J. ENNETT, Registered Porfessional Reporter by the National Shorthand Reporter's Association; and Official Court Reporter, United States District Court, District of Puerto Rico;

DO HEREBY CERTIFY that the foregoing transcrip is a full, true and correct record which was taken down by machine shorthand by me and thereafter reduced to typewritten form under my direction;

I FURTHER CERTIFY that I am in no way interested in the outcome of the case named in said caption.

CECIL J. ENNETT,

RPR.

APPENDIX B

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 85-1655

ARNALDO JIMENEZ-FUENTES, ET AL.,
Plaintiffs, Appellees,

v.

HON. JAIME TORRES GAZTAMBIDE ET AL.,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. Raymond L. Acosta, *U. S. District Judge*]

Before Campbell, *Chief Judge*,
Aldrich and Torruella, *Circuit Judges*.

Marcos A. Ramirez Lavandero for appellants.
Frank Rodriguez-Garcia for appellees.

December 20, 1985

Aldrich, *Senior Circuit Judge*. Sir Winston Churchill once said, "Politics are almost as exciting as war, and quite as dangerous." Remarks, 1920. While the dangers of war are difficult to contain, the courts, federal and state, have made determined efforts in the lesser field. *E.g.*, *Branti* v. *Finkel*, 445 U.S. 507 (1980); *Elrod* v *Burns*, 427 U.S. 347 (1976); *Colon* v. *CRUV*, 84 J.T.S. 52 (P.R. 1984); *Montaguila* v. *St. Cyr*, 433 A.2d 206 (R.I. 1981); *Battaglia* v. *Union County Welfare Bd.*, 88 N.J. 48, 438 A.2d 530 (1981). At the same time, if we may advance our own phrase, politics is the life-blood of the body politic, and too much constraint could be as dangerous as too little. In the present case, defendant appellants claim over-restraint.

In an attempt to set rules for patronage, or what has been grossly called the spoils system, the legislature of the Commonwealth of Puerto Rico enacted the Puerto Rico Public Service Act of 1975, P.R. Laws Ann., tit. 3, §§ 1301-1431, hereafter, Personnel Law. Under this law, civil service positions in Puerto Rico are drawn into two categories: career employees and confidential employees. *Id.* § 1349. Career employees are selected and promoted solely on the basis of merit; confidential employees "shall be of free selection and removal." *Id.* § 1350. The position of regional director in the Urban Renewal and Housing Corporation, or CRUV (Corporacion de Renovacion Urbana y Vivienda), is designated a confidential position.

In November, 1984, after eight years of governors of the Partido Nuevo Progresista (PNP), the Partido Popular Democratico (PDP) won the governorship, the actual change taking place on January 2, 1985. After a discharge on January 4, shortly revoked, on March 20 plaintiff Jose Vicente Vazquez, a PNP member, was demoted from his position of Regional Director of the San Juan I District to a career position in the agency. On March 18, plaintiff Arnaldo Jimenez Fuentes, Regional Director for Caguas, had been similarly demoted. These actions were the result of orders by defendant Jaime Torres Gaztambide, the newly appointed PDP Secretary of the Department of Housing. The present suit by Jimenez and Vazquez names Gaztambide and Rolando Quevedo del Rio, Executive Director of CRUV, as defendants, alleging the demotions violated plaintiffs' First Amendment rights, and seeking restoration to their previous positions. After a twelve day hearing the district court issued a

preliminary injunction ordering that relief. We denied a stay and granted an expedited appeal, and now affirm.

The basis of the constitutional claim is that plaintiffs are members of the PNP and defendants of the PDP, and, allegedly, defendants removed plaintiffs for that political reason. Defendants deny this, but assert it would be a protected reason in any event, and say, further, that there were substantive reasons beyond that. The court found against them on all points.

By this time we need not dwell on the principle that the district court's findings of fact must stand unless clearly wrong, or based upon an error of law. This includes the court's present necessary findings of a likelihood that plaintiffs will succeed on the merits, that they would, meanwhile, suffer irreparable harm, superior to that suffered by defendants, and that an injunction would be in the public interest. *Planned Parenthood League of Mass.* v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981). On this basis we need spend no time on defendants' attempt to criticize the court's finding that the demotions were politically motivated. There were eleven regional directors, all PNPs, and, in one way or another, defendants got rid of all eleven, without apparent reference to personal performance. Defendants' asserted ignorance of party affiliation is incredible on its face.

As to their second point, defendants' reliance on the classifications in the Personnel Law is misplaced. However material that statute may be in determining whether an employee has a property right in his job from the standpoint of due process removal and actions for discrimination, *cf. Bishop* v. *Wood*, 426 U.S. 341, 345 (1976); *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972); *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972), the First Amendment right recognized in *Elrod* extends to all that fit it substantively; it cannot be legislated away. Indeed, the Personnel Law objectives, embracing all "confidential" employees, seem addressed to the true meaning of the word — employees who must be trusted to respect all confidences to which they might be exposed. See, for example, in section 1350's compilation, subsection "(3) Assistant heads of agencies and their personal secretaries and drivers." However important it is that employees keep confidences, general trustworthiness is not to be measured by political affiliation. To continue the war analogy, our side versus the enemy, would be quite incompatible with First

Amendment freedoms. *Branti*'s reformulation of the *Elrod* standard, whether political affiliation is "an appropriate requirement for... effective performance of the public office involved," *Branti*, ante, 445 U.S. at 518, recognized that labels like "confidential" or "policymaking" do not alone render political affiliation an appropirate prerequisite for a particular job.

We realize, as we believe did the district court, that a court should go slow before granting, by an interlocutory order, the affirmative relief ultimately requested. And it is, of course, understandable, not only that political officeholders wish to be surrounded by kindred thinkers, but also, to return to our original observation, that there must be some prospective rewards for political activities, or the life-blood will dry up. It is difficult not to share in the views expressed by Justice Powell, dissenting in *Elrod*, which we have crudely reflected, ante, in speaking of politics as the life-blood of the body politic.[1] However, it is also impossible to dismiss the plurality opinion views, not only as to personal rights, but as to the "inefficiency" of "wholesale" turnovers, 427 U.S. at 364 & 367; *see, also, Colon* v. *CRUV*, 84 J.T.S. 52 (P.R. 1984), every time there is a shift in the majority of the voters. It is worth noting that in *Colon* v. *Cruv* the Supreme Court of Puerto Rico made the same adverse finding with regard to these very offices as did the district court. While defendants' disappointment is understandable, and their arguments as to the political importance of plaintiffs' positions not without merit, we cannot say that the district court was clearly wrong in its tentative conclusions, or misapplied the standard.

We will add two comments. Defendants say, suppose our party platform had included a promise to reorganize this department and make drastic changes; how could we have done it? The short answer is that that is not this case. When the voters can be said to have asked for identified changes, they may well be addressable.

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[1] It would be presumptuous to attempt to summarize Justice Powell's dissent (concurred in by the Chief Justice, and Justice Rehnquist), 427 U.S., ante, at 376-389, but we quote the following. "Patronage practices broadened the base of political participation by providing incentive to take part in the process thereby increasing the volume of political discourse in society. Patronage also strengthened parties, and hence encouraged the development of institutional responsibility to the electorate on a permanent basis." (379).

There must be limits, however, even to this. Changes of personnel simply on party lines may be what the majority voters asked for, but that desideratum is impermissible.

Second, possibly the majority of voters might want a general change in party affiliation because of confirmed habits of the current office-holders to show improper preferences, with the aid of their powers, to their own party members. Cynically, we might ask whether this reason, although properly prompted, may not contain the equal thought that now it will be our turn; in other words, not rectification, but the spoils system all over again. Defendants must use less draconian methods to cure improprieties. And, of course, as the district court properly noted, there is nothing in the present doctrine forbidding a proper removal.[2] Meanwhile, it could be thought that the very fact that plaintiffs were under scrutiny by political opposites would have a salutary effect. True, they are high level employees, but defendants have two above them. This is a problem to which there is no perfect solution. We cannot quarrel with the district court's provisional resolution. *Cf. Tomczak* v. *City of Chicago*, 765 F.2d 633, 639 (7th Cir. 1983).

The final matter calling for our comment is defendants' so-called *Mt. Healthy* defense.[3] In *Mt. Healthy*, the Court recognized a defendant's right to show that, improper motive notwithstanding, it would have discharged the employee in any event. Indeed, if the employment relationship is such that no cause is needed for discharge, the employment can be terminated "for no reason whatever," so long as it is not an illicit reason. *Mt. Healthy*, 429 U.S. 274, at 283 (First Amendment); *cf. NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666, 669 (1st Cir. 1979) (unfair labor practice.). There is, of course, a question of proof. *See, e.g., Dance* v. *Ripley*, No. 85-1237 (1st Cir. 10/7/85). Defendants' claim here fell in two parts. First, they argue that

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[2] We take issue, however, with the court's suggestion that plaintiffs may be dismissed for cause only after an administrative hearing. While this course may effectively insulate officials from charges of political discrimination, nothing in any of the cases — nor, for that matter, the Personnel Law, as we read it — mandates it. *See* post.

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[3] *Mt. Healthy City School District* v. *Doyle*, 429 U.S. 274 (1977).

they already knew enough grounds for dissatisfaction to justify demotion on the merits. The court was fully warranted in its interim view that these claimed grounds were not the true motivation for demotion. The *Mt. Healthy* test is not whether a sufficient reason existed, but whether, in fact, it was the reason truly espoused. Second, defendants claim that there were even stronger reasons, although not come to light at the time of the demotions. The court held that these could not be considered because, obviously, they could not have been relied on. Inasmuch as we are dealing with a continuing injuction, this was error. *See Smallwood* v. *United Airlines, Inc.*, 728 F.2d 614, 623 (4th Cir. 1984); *Gibson* v. *Mohawk Rubber Co.*, 695 F.2d 1092, 1097 (8th Cir. 1982); *Murnane* v. *American Airlines, Inc.*, 482 F. Supp. 135, 148 (D.D.C. 1979), *aff'd*, 667 F.2d 98 (D.C.Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). It is irrelevant that these were age discrimination cases; the principle is the same. We remind the court of *Mt. Healthy*'s caveat, that a party is not to be put in a better position as a result of protected conduct than he would otherwise have been in. 429 U.S. at 285, 286. That is not presently this case, but the court erred in saying it would not consider matters coming to defendants' attention subsequent to the demotion.

At this time and on this record, the court's refusal to consider these matters was harmless error. However, it is to be borne in mind that plaintiffs, under the Puerto Rican statute, have no property interest in their position, and may be discharged without cause. *Laureano* v. *Garcia-Caraballo*, 731 F.2d 101 (1st Cir. 1984). Accordingly, any time that defendants can show they are demoting for other than an illicit reason, no matter what it may be, that will be the end. This principle is relevant both with respect to the continuance of the injunction and to damages.

We have considered defendants' other complaints, and find none worthy of discussion. That there could be found to be irreparable harm, and due public interest, *see Elrod*, ante, 427 U.S. at 373.

Affirmed.

(Concurrence follows)

TORRUELLA, *Circuit Judge* (Concurring). Although I agree with the result reached by my brethren, and with much of their reasoning, I respectfully disassociate myself from those parts of this opinion which constitute *obiter dicta* and are advisory in nature. *Paschall* v. *Christee-Stewart, Inc.*, 414 U.S. 100 (1973), *reh'g denied*, 414 U.S. 1138 (1973); *Stephens, Inc.* v. *United States*, 464 F.2d 53 (8th Cir. 1972) *cert. denied*, 409 U.S. 1118 (1972). Particularly when dealing with what the majority, in quoting Churchill, has aptly described as something "quite as dangerous" as war, I am of the opinion that Article III courts should be especially fastidious in not supplying ammunition for future use by any side. It would appear that parties as ably represented as were those in this litigation should be able to navigate the well-charted waters of § 1983 litigation without unnecessary prompting on our part.

APPENDIX C

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 85-1655

ARNALDO JIMENEZ FUENTES, ET AL.,
Plaintiffs, Appellees,

v.

JAIME TORRES GAZTAMBIDE, ET AL.,
Defendants, Appellants.

JUDGMENT

Entered: December 20, 1985

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court is affirmed.

By the Court,
Francis P. Scigliano
Clerk.

APPENDIX D

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 85-1655

ARNALDO JIMENEZ FUENTES, ET AL.,
Plaintiffs, Appellees,

v.

HON. JAIME TORRES GAZTAMBIDE, ET AL.,
Defendants, Appellants.

MEMORANDUM ON PETITION FOR REHEARING

Campbell, *Chief Judge*,
Aldrich and Torruella, *Circuit Judges*

Marcos A. Ramirez-Lavandero for appellants.
Frank Rodriguez-Garcia for appellees.

February 6, 1986

Per Curiam. In accordance with a growing, and all too frequent, practice, disappointed appellants seek rehearing with allegations founded more on the fact that they lost than on the content of our opinion. Basically, we have "conflict[ed] with precedents already established," and have not given adequate "consideration to the District Court's application of an improper legal standard."[1] Stopping here, we held that the district court had applied a proper standard. Nor should it be difficult to see that the cases we failed to cite were pre-*Branti* v. *Finkel*, 445 U.S. 507 (1980), and to note that we referred, in so many words, to "*Branti's reformulation* of the *Elrod* standard." (Emphasis supplied.)

Next, defendants protest that they "did not rely on the classifications of the Personnel Law." Seemingly they forget that a whole section of their Memorandum of Law has an early sentence setting the tone of the several pages following. "Here, appellants' actions must be understood in the context of the Puerto Rico Public Service Personnel Act of 1975...." Defendants next assert that under both *Branti* and *Elrod* there is no First Amendment protection for positions — employees — having "meaningful input into government policymaking or ... access to confidential information." This is a substantial oversimplification of *Branti*, which qualified those terms by adding a requirement of the appropriateness, viz., an affirmative need, of party affiliation for proper performance of the job. In respect to such need the petition, like the initial brief, is totally silent. We list all given duties of plaintiff Jimenez-Fuentes' position in an appendix, the political nature of which a court might well feel to be superficial (by stipulation of the parties, these duties are identical to the duties performed by plaintiff Vicente Vazquez).

Finally, the petition quite misstates what we said in regard to *Mt. Healthy City School District* v. *Doyle*, 429 U.S. 274 (1977).

The petition is denied.

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[1] We have also, incidentally, treated this as "another run of the mill preliminary injunction case;" evidenced, apparently, by the fact that we cited only one case to supply the ground rules.

Appendix

COMMONWEALTH OF PUERTO RICO
CENTRAL OFFICE FOR PERSONNEL ADMINISTRATION
BOX 8476, FERNANDEZ JUNCOS STATION
SANTURCE, P.R. 00910

JOB DESCRIPTION

1. Department or Agency: Housing Department
2. Bureau, division and section: Public Housing Adm.
   Caguas Region

* * *

4. First Surname: JIMENEZ
   Second Surname: FUENTES
   Name: ARNALDO

* * *

6. Title of Classification of Position: Regional Director

* * *

7. Detail the work you perform in the order of importance of the different tasks, starting with the most important.... Use your own words and make a description of your duties so clearly that persons not familiriazed [sic] with your job would understand exactly what [it] is that you do....

1. Directs, plans and supervises the operational and administrative activities of the Region, such as: Accounting, Personnel and Occupation, Maintenance, Modernization, Community Labor, Management and Section 8.

2. Reviews and signs the reports submitted to the Central Office, HUD and other related agencies.

3. See to it that the norms and regulations are complied with in accordance to the philosophy of the Public Housing Administration and the HUD Federal Agency.

4. Arranges periodic meetings with supervisory personnel to counsel and inform as to changes in norms and regulations and/or new work guidelin[e]s and other matters.

5. Reviews, approves and signs the reports on rent changes. which are sent to the Federal Agency, Central Office of the Housing Department and other agencies; reports on Accounting, purchase orders, disbursements, functional budgets of the Region and preliminary budget of maintenance works and others.

6. Attends, representing the Agency, to meetings with other government officers or civic leaders from the community in order to discuss and coordinate the implementation of Social Services, economics, health and other type[s] of services offered to public housing residents and programs of the Housing Department.

7. Drafts reports related to the work performed.

8. Drafts correspondence for the signature of the Associate Director and/or CRUV Executive Director.

9. Supervises and evaluates the Supervisors of the different sections attached to the Region.

10. Makes recommendations on personnel recruitment, dismissals, promotions, salary increases and other relations with the Region's employees.

11. Recruits necessary irregular personnel at the Region.

12. Receives and hears residents or general public in problematic cases which have not been solved at a lower level.

13. Performs periodic visits to the housing projects at the Region.

14. Attends periodic meetings with the Associate Director, to discuss problems related to the operations of the Region.

15. Offers recommendations to the Executive Director to improve the services rendered by the Program.

16. Arranges meetings with residents and/or organized groups in the community for the coordination of social activities.

17. Plans and organizes training for the Region's employees in coordination with the Training Committee.

18. Receives telephone calls to give or receive information related to the Region's operations.

19. Is responsible for the preparation and control of the functional budget of the Region.

20. Performs any task as assigned.

APPENDIX E

CLERK'S OFFICE
U.S. COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1655 Fuentes v. Hon. Gaztambide

(Date) 2-14-86

Mandate herein issued today.

Francis P. Scigliano, Clerk.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1655

ARNALDO JIMENEZ FUENTES, ET AL.,
Plaintiffs, appellees,

v.

HON. JAIME TORRES GAZTAMBIDE, ET AL.,
Defendants, appellants.

Before

Campbell, *Chief Judge*,
Coffin, Bownes, Breyer and Torruella,
Circuit Judges.

ORDER OF COURT

Entered: February 19, 1986

The appellants Honorable Jaime Torres Gaztambide, et al., petition this Court to rehear en banc the above-captioned case. We hereby grant the petition. The panel opinion is withdrawn, the judgment of this Court is vacated, and mandate is recalled from the District Court. Argument will be heard during the May, 1986, session.

The Court will consider all previous briefs filed with the panel. The parties may in addition file supplemental briefs no later than March 19, 1986.

By the Court,
Francis P. Scigliano
Clerk.

APPENDIX G

United States Court of Appeals
For the First Circuit

No. 85-1655

ARNALDO JIMENEZ FUENTES, ET AL.,
Plaintiffs, Appellees,
v.
HONORABLE JAIME TORRES GAZTAMBIDE, ET AL.,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Raymond L. Acosta, *U. S. District Judge*]

Before
Campbell, *Chief Judge*,

Aldrich, Coffin, Bownes, Breyer and Torruella,
Circuit Judges

September 19, 1986

OPINION EN BANC

COFFIN, *Circuit Judge*. Plaintiffs-appellees, Arnaldo Jimenez Fuentes and Jose Vicente Vazquez, claim that they were transferred from their government positions for political reasons in violation of the first and fourteenth amendments. After a lengthy hearing, the United States District Court for the District of Puerto Rico issued a preliminary injunction, ordering their reinstatement. A panel of this court denied a stay, granted an expedited appeal, and affirmed the order of the district court. After the panel denied rehearing, this court vacated the panel's opinion, setting the case for rehearing *en banc*. In light of full briefing and oral argument, and a review of the district court hearing and the relevant case law, we reverse the issuance of a preliminary injunction.[1]

I

Plaintiffs Jimenez Fuentes and Vicente Vazquez are members and active participants of the Partido Nuevo Progresista (PNP), the ruling party in Puerto Rico from 1977 to 1985. They were two of the eleven Regional Directors of the Puerto Rico Urban Development and Housing Corporation (CRUV — Corporacion de Renovacion Urbana y Vivienda). CRUV is a public corporation, 17 L.P.R.A. §§ 21-25 (1984), attached to the Department of Housing of the Commonwealth of Puerto Rico, 3 L.P.R.A. §441(e) (1982). As Regional Directors, plaintiffs worked in the Program of Public Housing, the principal division of CRUV.

In November 1984, the Partido Popular Democratico (PPD) defeated the PNP in the gubernatorial election, and assumed power in January 1985. Defendants-appellants, Jaime Torres Gaztambide (Secretary of the Department of Housing of Puerto Rico) and Quevedo del Rio (Executive Director of CRUV), both PPD members, were appointed within two months. In March 1985, they transferred plaintiffs from the positions of Regional Director to the plaintiffs' previously-held positions at CRUV.

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[1] In a companion case, *DeChoudens* v. *Government Development Bank of Puerto Rico*, No. 86-1059, slip op. (1st Cir. Sept. 18, 1986), we affirm a district court's issuance of a preliminary injunction reinstating the Vice President of the Finance Area in the Government Development Bank

II.

At the outset we note the burden plaintiffs faced in order to gain a preliminary injunction:

> "In the First Circuit, a plaintiff must satisfy four criteria in order to be entitled to a preliminary injunction. The Court must find: (1) that plaintiff will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) *that plaintiff has exhibited a likelihood of success on the merits*; and (4) that the public interest will not be adversely affected by the granting of the injunction."

Planned Parenthood League of Massachusetts v. *Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981) (quoting *Women's Community Health Center, Inc.* v. *Cohen*, 477 F. Supp. 542, 544 (D. Me. 1979) (citations omitted)) (emphasis added).

For purposes of appellate review, the issue is whether "the issuance of the injunction, in light of the applicable standard, constituted an abuse of discretion." *National Tank Truck Carriers, Inc.* v. *Burke*, 608 F.2d 819, 823 (1st Cir. 1979) (quoting *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975)). The constitutionality of the demotions was not before the district court and is not presently before us because there has been no trial on the merits. "The only question properly before the Court is whether or not a preliminary injunction should have been issued to reinstate plaintiffs to their positions as Regional Directors. *See Thornburgh* v. *American College of Obstetricians and Gynecologists*, 54 U.S.L.W. 4618, 4636 (U.S. June 11, 1986) (O'Connor, J. dissenting). We emphasize that because we hear this matter on appeal from a grant of a preliminary injunction, our "conclusions" and "holdings" as to the merits of the issue presented are to be understood as statements as to probable outcomes. *Planned Parenthood*, 641 F.2d at 1009. "We eliminate repeated reference to this fact at each relevant juncture of this lengthy opinion for purposes of brevity and simplicity." *Id.*

III.

Defendants claim that the district court abused its discretion in finding that the plaintiffs had shown a likelihood of success on the merits. To support this argument, they challenge three independent findings by the district court: one, that plaintiffs were transferred for political reasons; two, that the positions of Regional Directors were not positions for which political affiliation was appropriate; and three, that plaintiffs would not have been transferred but for their political affiliation. Defendants correctly point out that if any of the findings were an abuse of discretion, we must reverse the issuance of the preliminary injunction.

A.

We cannot say that the district court abused its discretion in finding that the plaintiffs were transferred for political reasons. See *Rosaly* v. *Ignacio*, 593 F.2d 145, 149 (1st Cir. 1979) (whether protected conduct was a substantial or motivating factor in decision to discharge plaintiff). The court found that the proximity in time between the defendants' appointment and the plaintiffs' transfer indicated an underlying political motive, especially in light of the unrefuted evidence that plaintiffs were active PNP members.[2] Although defendant Quevedo del Rio testified that he did not know the plaintiffs' political affiliation when he dismissed them, the district court did not believe this statement, in part because of Quevedo's admission that a Regional Director, to be effective, must be a member of the PPD. In response to the defendants' assertion that plaintiffs were transferred because of their incompetency, the district court found that at no time prior to their removal were plaintiffs ever apprised of any such allegation. Additionally, plaintiffs had never been admonished or disciplined for their work. whether or not we would have reached the same conclusion as to this issue, we cannot say that the district court abused its discretion.

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[2] Jimenez Fuentes served as the political auditor for the PNP mayor of Juncos, assisting the mayor generally in his campaign. Vicente Vazquez was the PNP Coordinator of the Electoral Unit and Secretary of the Association of Pro-Statehood Engineers, as well as the campaign director for a Commonwealth Senator, Chito Ojeda.

B.

We now address the dispositive issue — whether political affiliation is an appropriate requirement for the position of CRUV Regional Director.

1. *Survey of the Authorities*

In *Elrod* v. *Burns*, 427 U.S. 347 (1976), the Supreme Court held that public employees who alleged they were discharged because of their political affiliation stated a claim for violation of their first and fourteenth amendment rights.[3] Writing for a plurality, Justice Brennan determined that a dismissal based on an employee's failure to support a political party clearly infringes First Amendment freedoms of belief and association. *Elrod*, 427 U.S. at 359-60. The conditioning of public employment on political affiliation could survive constitutional challenge only if it furthered a vital governmental interest[4] by a means least restrictive of first amendment freedoms. *Id.* at 362-63. The plurality found that a *valid interest* was to ensure that "representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Id.* at 367. But a patronage system involving the wholesale dismissal of public employees for partisan reasons, applied without regard to an employee's responsibilities, was not the least restrictive means of serving that interest. The plurality thus concluded that "[l]imiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end." *Id.* at 366.

Apart from noting that it is not always easy to determine when a particular position is policymaking, *id.* at 367, the plurality opinion provides little guidance for lower courts because it did not apply the new legal standard to the particular positions in

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[3] Plaintiffs in *Elrod* were employees of the Cook County Sheriff's Office, including the chief deputy of the process division, the bailiff, and a process server.

[4] The plurality cautioned that "care must be taken not to confuse the interests of partisan organizations with governmental interests," 427 U.S. at 362, to which it added, "[o]nly the latter will suffice," *id.*

question. It did, however, suggest that employees who act as advisers, who formulate plans for implementing broad goals, or whose responsibilities are either not well-defined or of broad scope are more likely to function as policymakers. 427 U.S. at 367-68.

Justice Stewart's concurring opinion in *Elrod*, necessary for the 5-3 decision,[5] narrowed the scope of the plurality's protection formulation. His opinion concludes that confidential, as well as policymaking, employees can be discharged because of their political beliefs. *See id.* at 375.

Subsequently, in *Branti* v. *Finkel*, 445 U.S. 507 (1980), the Court, with Justice Stevens writing for a majority, departed from the policymaking and confidential labels espoused in *Elrod*. It first recognized that the labels were underinclusive, because "a position may be appropriately considered political even though it is neither confidential nor policymaking in character." *Id.* at 518.[6] More importantly, the Court found that the labels were overinclusive, because party affiliation is not a relevant consideration for all policymaking or confidential positions. *Id.* The Court distinguished between policymaking positions related to "partisan political interests [or concerns]," *id.* at 519, which would be vulnerable to discharge, and positions having no bearing on such concerns, which would be protected by the First Amendment.[7] As an example of the latter, the Court discussed the position of a state university football coach, which is policymaking, but for

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[5] The concurring opinion was joined by Justice Blackmun.

[6] As an example, Justice Stevens described the position of an election judge, where state election laws require that precincts be supervised by two judges of different parties. *Id.*

[7] Although *Branti*'s requirement that a position relate to "partisan" concerns at first seems at odds with the use of that term in *Elrod*, the two are consistent. The plurality opinion in *Elrod* states that political firing can only be justified by governmental interests, not the interests of partisan *organizations*. The Court in *Branti* reaffirms that conclusion, but, in finding *Elrod*'s policymaking and confidential labels overinclusive, determined that the positions must relate to "partisan political concerns." Thus, *Elrod* and *Branti* hold that political firing is consitutional when it serves the interests of the government, not a party organization; it serves a governmental interest when used for policymakers or confidential employees whose work involves issues where there is room for political disagreement on goals or their implementation.

which it cannot seriously be argued that "Republicans make better coaches than Democrats...no matter which party" controls state government. *Id.* at 518.

Branti thus frames the "ultimate question" as "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. That an employee is in a policy-making or confidential position[8] remains relevant to the ultimate inquiry, but it is no longer dispositive. *See Meeks* v. *Grimes*, 779 F.2d 417, 420 (7th Cir. 1985). After making these observations, the Court applied the new legal standard to the position in question. It determined that the functions of an assistant public defender, though policymaking, related to "the needs of individual clients and not to any partisan political interests." 445 U.S. at 519. Likewise, although public defenders shared confidential information arising out of their various attorney-client relationships, the Court found that such confidentiality did not have any bearing on "partisan political concerns." *Id.*

To the skeletal teachings of *Elrod* and *Branti* have been added a considerable body of case law from circuit courts of appeal and district courts. This seems a helpful corpus because of the variety of governmental positions considered, the additional inquiries made (consistent with the objective charted by the Court), and the

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[8] In addition to policymaking and confidential positions, the *Branti* Court added the position of a spokesperson:

> "[T]he Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments." 445 U.S. at 518.

Consistent with this statement, the Third Circuit in *Brown* v. *Trench*, 787 F.2d 167 (3d Cir. 1986), analyzed the propriety of firing, for political reasons, an employee responsible for writing press releases, speeches, communicating with legislators, and presenting the views of the county commissioners to the press and public on a daily basis. Although some of the employee's duties were clerical, and her writings were based on information from other departments and were never released until reviewed both by her supervisor and the Commissioners, the court found political affiliation to be appropriate because of the employee's role as a spokesperson. 787 F.2d at 170.

overall coherence and consistency of these lower court decisions. We accordingly report our survey of this body of law.

The courts have found employees in the following positions to be subject to removal based on their political affiliation: Assistant Director of Public Information for county, *see Brown* v. *Trench*, 787 F.2d 167 (3d Cir. 1986); First Deputy Commissioner of the Department of Water, *see Tomczak* v. *City of Chicago*, 765 F.2d 633 (7th Cir. 1985); Superintendent of Employment for Chicago Park District, *see Shakman* v. *Democratic Organization of Cook County*, 722 F.2d 1307 (7th Cir. 1983); assistant district attorney, *see Livas* v. *Petka*, 711 F.2d 798 (7th Cir. 1983); *Mummau* v. *Ranck*, 687 F.2d 9 (3d Cir. 1982) (per curiam); fee agent, *see Sweeney* v. *Bond*, 669 F.2d 542 (8th Cir. 1982); city solicitor and assistant solicitor, *see Ness* v. *Marshall*, 660 F.2d 517 (3d Cir. 1981); Senior Citizens' Coordinator, *see Nekolny* v. *Painter*, 653 F.2d 1164 (7th cir. 1981); Deputy Parks Commissioner, *see Ecker* v. *Cohalan*, 542 F. Supp. 896 (E.D.N.Y. 1982); state director of the Farmers Home Administration, *see Committee to Protect the First Amendment Rights of Employees of the Department of Agriculture* v. *Bergland*, 626 F.2d 875 (D.C. Cir. 1979) (pre-*Branti*); *Brunton* v. *United States*, 518 F. Supp. 223 (S.D. Ohio 1981).

Employees in the following positions were found not subject to dismissal under *Elrod* and *Branti*: city court bailiffs, *see Meeks* v. *Grimes*, 779 F.2d 417 (7th Cir. 1985) (remanding for further findings); road-graders, *see Horton* v. *Taylor*, 767 F.2d 471 (8th Cir. 1985); bookkeeper, *see Grossart* v. *Dinaso*, 758 F.2d 1221 (7th Cir. 1985); deputy court clerks, *see Barnes* v. *Bosley*, 745 F.2d 501 (8th Cir. 1984); deputy sheriff, *see Jones* v. *Dodson*, 727 F.2d 1329 (4th Cir. 1984); *Barrett* v. *Thomas*, 649 F.2d 1193 (5th Cir. 1981); supervisor of county branch of the Auditor's office, *see DeLaCruz* v. *Pruitt*, 590 F. Supp. 1296 (N.D. Ind. 1984); city clerk, *see Visser* v. *Magnarelli*, 530 F. Supp. 1165 (N.D.N.Y. 1982).

2. *The Guidelines of Analysis*

From this review of the case law we draw the following propositions. The fundamental one, supporting the limited exemption from First Amendment protection against politically-motivated discharge, is that representative government needs a certain amount of leeway for partisan selection of agents in order to work. These agents may be policymakers, confidential employees, or others for whom party affiliation is an equally "appropriate" requirement. Appropriateness is, we think, a corollary to our system of determining the direction of governmental entities by the popular election of top office holders who have taken or are considered to have taken positions on one or more issues during a campaign. In order for the new administration to be given an opportunity to fulfill expectations, it must have available and also appear to have available significant facilitators of policy, people who have the personal and partisan loyalty, initiative, and enthusiasm that can make the difference between the acclaimed success of a government agency or program and its failure or, more typically, its lackluster performance. The presence of such persons advances the goals of representative government; their absence, in *Elrod*'s term, "undercut[s]" such government. 427 U.S. at 367.

Identifying generic categories of positions where partisan selection and rejection are permissible has, as we have seen, proven to be an elusive and intractable task. But as courts have addressed the task, they have shed light on useful approaches. A threshold inquiry, which derives from *Branti*, involves examining whether the position at issue, no matter how policy-influencing or confidential it may be, relates to "partisan political interests . . . . [or] concerns." 445 U.S. at 519. That is, does the position involve government decisionmaking on issues where there is room for political disagreement on goals or their implementation? Otherwise stated, do party goals or programs affect the direction, pace, or quality of governance?

If this first inquiry is satisfied, the next step is to examine the particular responsibilities of the position to determine whether it resembles a policymaker, a privy to confidential information, a

communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement. We would note that in conducting this inquiry, courts focus on the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office. *Tomczak*, 765 F.2d at 640; *Ness*, 660 F.2d at 522; *Alfaro de Quevedo* v. *De Jesus Schuck*, 556 F.2d 591, 593 n.4 (1st Cir. 1977). "The relevant inquiry is to the function of the public office in question and not the actual past duties of the particular employee involved." *Brown*, 787 F.2d at 168. "Thus, if an officeholder performs fewer or less important functions than usually attend his position, he may still be exempt from the prohibition against political terminations if his position inherently encompasses tasks that make his political affiliation an appropriate requirement for effective performance." *Tomczak*, 765 F.2d at 641.

With this perspective in mind, a court's function, it seems to us, is to do what courts are often called upon to do — to weigh all relevant factors and make a common sense judgment in light of the fundamental purpose to be served. The analogies that come to mine are the following determinations: whether an employee is a supervisor and therefore not a proper member of a bargaining unit, *see Fall River Savings Bank* v. *NLRB*, 649 F.2d 50 (1st Cir. 1981); whether an individual is an independent contractor or an agent, *see Penthouse International, Ltd.* v. *Barnes*, No. 85-6023, slip op. (9th Cir. June 24, 1986); and whether, in a suit under the Federal Torts Claims Act, an official performs discretionary or ministerial duties, *see Ricci* v. *Key Bancshares of Maine, Inc.*, 768 F.2d 456 (1st Cir. 1985). In determining whether a particular position is policymaking, we are guided by Judge Weinstein's catalogue of relevant factors:

> "Whether any particular non-elective position in government serves this function of responding relatively directly to the voters requires some practical sense for the political-governmental system in operation. Among the indicia that locate a job along the spectrum between policymaker and clerk are: relative pay, technical competence, power to control others, authority to speak in the name of policymakers,

> public perception, influence on programs, contact with elected officials and responsiveness to partisan politics and political leaders."

Ecker v. *Cohalan*, 542 F. Supp. 896, 901 (E.D.N.Y. 1982). To this we would add the factor of "responsibilities that are not well defined or are of broad scope." 427 U.S. at 368.

3. *Analysis of the Position of Regional Director of CRUV*

Our first inquiry, then, is whether the position relates to partisan political interests or concerns. At this stage of the proceedings, we conclude that it does. The Regional Director is an employee of CRUV, one of several divisions that carry out the policies of the Department of Housing. CRUV's objective is to improve the living conditions of low and middle income families in urban areas. Among other goals, it attempts to reduce inadequate housing, meet the demand for new housing, encourage private industry's participation in the provision of housing, improve urban communities that lack adequate facilities, and promote the community's participation in the housing area. Its customers include almost 300,000 families. There are several areas within CRUV, the principal division being the Program of Public Housing, which employs 3,300 persons in eleven regional offices throughout Puerto Rico, approximately 90% of all CRUV employees.

Although CRUV's objective is to assist in the provision of housing to *all* low and middle income urban residents regardless of political persuasion, the subject-matter of the division's work is still of a political nature in the context of the Court's opinion in *Branti*. We think this point is well-illustrated by *Tomczak* v. *City of Chicago*, 765 F.2d 633 (7th Cir. 1985), where the Seventh Circuit reversed the district court's judgment that the plaintiff, the First Deputy Commissioner of the Department of Water, was protected from partisan termination. The district court had found that the plaintiff's "only area of decisionmaking authority, while broad within that area, related solely to the mundane decisions

concerning the repair and rehabilitation of [Chicago's] water systems." *Id.* at 641. Finding that the goal of the Water Department was to provide service to all residents without regard to politics, the district court concluded that political affiliation was not an appropriate requirement for the position of First Deputy Commissioner. *Id.*

The Seventh Circuit disagreed, characterizing the district court's analysis as "an unduly myopic view of the role of politics in the seemingly apolitical context of universal provision of services." *Id.* The court stated that the "primary function of any local governmental entity is the provision of services" and that "[e]lections often turn on the success or failure of the incumbent to provide these services." *Id.* Even though plaintiff's position concerned the provision of water to *all* citizens, the court found that his responsibility in that position made political affiliation an appropriate requirement.

Similarly, the provision of housing to low and middle income city residents is a vital political issue, at least as important to partisan program goals as the provision of water discussed in *Tomczak*.[9] A specific illustration of the link between public housing and political philosophies was provided at the hearing by defendants' expert witness, Dr. Jack Hirsbrunner, who conducted a study of the CRUV and concluded that political affiliation was an appropriate criterion for the position of Regional Director. He testified that the ideological differences between the PNP, which

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[9] We are aware that the Puerto Rico Supreme Court, in *Colon* v. *CRUV*, 84 J.T.S. 52 (P.R. 1984), decided that the position of District Manager (similar to Regional Director) at CRUV was not one for which political affiliation was an appropriate requirement. It seems to have based its decision on the fact that the provision of housing was an apolitical task. The Court stated that it did not believe the efficient discharge of the duties of a Regional Director of a public housing program required a "given loyalty to the ideological axioms of a political party. Such a preference is not necessarily a valid criteria [sic] for being either the person entrusted with implementing that social program's policies, or the recipient of such benefits." *Id.* at 19.

We respectfully disagree. We do not frame the inquiry in terms of whether a position requires loyalty with a party's "ideological axioms," but instead, whether the position related to partisan political interests and concerns. As we explain in this section of the opinion, we find the threshold inquiry satisfied in this case.

favors statehood for Puerto Rico, and the PPD, which favors autonomy, give rise to conflicting approaches to the programs and functions of CRUV. An ideological conflict, he believed, would hinder an administration's program. For example, one party favors the government taking an active role in administering properties while the other prefers that private industry assume these functions; additionally, he stated that one party desires the utilization of federal funds, while the other supports the use of local funds.

We therfore hold that, at this juncture at least, the position satisfies the first inquiry.

Our second inquiry involves the inherent powers and privileges of the position of Regional Director. There are eleven Regional directors in all of Puerto Rico, serving under an Executive Director and an Associate Director. Under them serve some 3000 of the 3600 CRUV employees. The position's job description, as to which there was no disagreement at the hearing, contains twenty distinct duties. We deem the job description sufficiently important to include it as an Appendix to this opinion.

For purposes of analysis we have classified the duties into five groups, only one of which, the last, is neutral on the question of whether the position of Regional Director more closely resembles a policymaking/confidential official than a clerk. The other four clearly show that the Regional Director proposes, establishes, and implements public policy, is privy to confidential information, and acts as a spokesperson for the agency. What follows, then, is the list of job duties, organized by us into categories, with the original number of each duty retained.

1. *Policy-making Functions*

1. Directs, plans and supervises operational activities of the Region.
3. Monitors compliance with Commonwealth and federal regulations.
14. Discusses the Regional's operational problems with the Associate Director.

15. Recommends improvement in program to Executive Director.
19. Prepares and controls the Region's budget.
20. Performs any assigned task.

2. *Representative Functions*

4. Conducts periodic meetings on regulations, work guidelines, etc. with supervisory personnel.
6. Attends meetings, as agency representative, with other government officers and civic leaders to coordinate government services offered to public-housing residents.
12. Meets with residents and general public to resolve problem cases.
16. Meets with residents and organized groups to coordinate social activities.

3. *Spokesperson Functions*

8. Drafts correspondence for the Executive Director and Associate Director.

4. *Personnel Duties*

9. Supervises and evaluates Region's section supervisors.
10. Recommends recruitment, dismissals, promotions, salary increases, and other matters for Region's employees.
11. Recruits "necessary irregular personnel."
17. Organizes training of Region's employees.

5. *Ministerial Duties*

2. Reviews and signs reports to central office, HUD, and other agencies.
5. Reviews and signs reports on rent changes, purchase orders, disbursements, and budgets sent to other agencies.
7. Drafts reports on work performed.
13. Visits the Region's housing projects.
18. Receives telephone calls involving Region's operations.

In addition, plaintiff Jimenez Fuentes' own testimony at the hearing suggests his role as a policymaker:

> "As regional directors we deal — we have the responsibility of dealing with the debts at the public housing project. When I arrived in Caguas to direct the region, the problem of the debt was a very serious and extremely serious problem... I was sent to Caguas because...they had to send to Caguas someone who knew the region and who could do the work of a regional director.... Since I had knowledge of the problems of the debt in Caguas we immediately took corrective steps to fix the situation in Caguas."[10]

Likewise, plaintiff Vicente Vazquez testified that when he began as Regional Director, he was told that he "had to be tough and aggressive in order to straighten out this region." He stated that it had been "a challenge...to take control of the San Juan One Region and to lead it to be one of the best ones."

That the Regional Directors do not have final decision-making authority is not determinative of our inquiry. *Nekolny*, 653 F.2d at 1170. They are not like the successful plaintiff in *Barrett* v. *Thomas*, 649 F.2d 1193 (5th Cir. 1981), only one of several hundred deputies to a policymaking official. Rather, they are sole directors of an entire region, each supervising approximately three hundred employees. The Regional Director is, in effect, the alter ego of the Executive Director at the regional level. It is through the relationship with the Regional Directors

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[10] Jimenez Fuentes also testified that:

"The problem of the debt is not something that can be analyzed merely through a report regarding the debt. It's a much more complicated problem. And you have to see what are the attitudes and the jobs performed by the administrators who are the ones who deal directly with the problem of the debt....You have to analyze personnel, the attitude of the personnel, the money available in the budget for the maintenance. That is, there are specifically three areas which are very important, they are the rent collection, maintenance, and community work. ...If you don't work effectively with them, the attitude of personnel, the number of administrators you have, the budget, all those details.... We were able to organize a working team which greatly decreased the debt in that project.

that the Executive Director maintains effective control of the implementation of the housing programs.

Other courts that have analyzed the nature of the responsibilities of state directors of an agency or program have also found that such employees perform sufficiently important roles in government to make political affiliation an appropriate requirement. The District of Columbia Circuit, in a pre-*Branti* opinion, determined that state directors of the Farmers Home Administration exercised considerable control over the implementation of agricultural program policies at the state and local level such that they could be discharged for political reasons. *Committee to Protect the First Amendment Rights of Employees of the Department of Agriculture* v. *Bergland*, 626 F.2d 875 (D.C. Cir. 1979). The court found that even through the United States Civil Service Commission classified these positions as not confidential or policy-making positions, holders of those positions could insure the success or failure of the program. *Id*. at 879. As the court stated:

> "[P]ersons administering huge Federal government programs for an entire state will have a high policy component to their activities, both because such large scale exercise of power usually implicates substantive internal policy, and because such positions are a natural source for influential recommendations of changes in policy. Each state director supervises a staff of nearly 100 statewide and acts as 'the administration's pipeline and advocate at the state and the local level.'" *Id*.

In *Tomczak* v. *City of Chicago*, 765 F.2d 633 (7th Cir. 1985), the plaintiff argued that he was not a policymaker because he performed purely ministerial functions. the Seventh Circuit rejected that assertion, finding that he occupied the second highest job in a large city department, including the administration of a bureau with 1,150 employees and a large annual budget. *Id*. at 641-42. The court concluded that plaintiff was in a position where "his political affiliation could affect the ability of a new administration to implement new policies." *Id*. at 642. Relevant to our

case, the court found that, "even though ultimate decisionmaking authority in most areas rested with the Commissioner [and not the plaintiff], plaintiff had substantial input into those decisions" and his "duties were not strictly circumscribed and ...required something substantially more than simple ministerial competence." *Id.* (citation omitted).

Likewise, in *Brunton* v. *United States*, 518 F. Supp. 223 (S.D. Ohio 1981), the district court did not grant a preliminary injunction to state directors of the Farmers Home Administration because it found that such positions met the *Elrod-Branti* exception. The court found that:

> "each State Director is a vital cog in the machinery of a new Administration's formulation and implementation of national farm and rural development policies. More than any other person in the agency, the State Director is in the critical position of insuring either the success or failure of these national policies through the administration of [Farmers Home Administration] programs within his state area. It is certainly expected that these positions would be filled by individuals who will openly support and aggressively implement the policies of the in-party in the discharge of their duties." *Id.* at 239.

Consistent with these opinions, we find that the Regional Director acts as the Executive Director's representative at the regional level. They "develop, plan, coordinate, revise, and monitor the progress of the agency's programs and thus gauge the success of the Administration's [Commonwealth] policies." *See id.* Without the Regional Directors' political sympathy and loyal cooperation, the Executive Director "might face a situation where the hostile efforts or foot-dragging actions of any one of the [eleven Regional Directors] could singlehandedly thwart the Administration's goals in that particular [region]." *See id.* As Justice Powell noted in his dissenting opinion in *Branti*, "if government is to work, policy implementation is just as important as policymaking." 445 U.S. at 530.

We think it also of note that the Regional Directors fall within the small category of "confidential" employees under the Puerto

Rico Public Service Personnel Act of 1975, 3 L.P.R.A. §1301 (1978). The Act establishes a civil service personnel system in which all Puerto Rico government employees are classified into two categories. *Id.* §1349. Confidential employees, who are of "free selection and removal," are those who "intervene or collaborate substantially in the formulation of the public policy, who advise directly or render direct services to the head of the agency, such as...Regional directors of agencies." *Id.* §§1350 & 1350 (4). The larger category is that of career employees, who are selected strictly on merit and can be removed only for cause. *Id.* §§1331-1338.[11]

Although we do not believe a legislature's classification system is determinative of the *Elrod-Branti* question, we do think it is entitled to some deference. *See e.g., Ness* v. *Marshall*, 660 F.2d 517 (3d Cir. 1981). Thus, we think it significant that Regional Directors are among the few positions treated as policymaking with the Commonwealth's personnel system. The Act generally limits the number of confidential positions to twenty-five per agency, *id.* §1351 (3), and only twelve employees from the Program of Public Housing were so designated. Eleven of the twelve were Regional Directors. With the agency at least, plaintiffs were considered to be at the policymaking end of the spectrum.[12]

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[11] When appointed to confidential positions, career employees retain their right to career positions. If removed from their confidential positions, they must be reinstated to their previously-held career positions, as occurred in this case.

[12] The district court found, as a result of the testimony of Jorge Guillermety, former Associate Director of Public Housing, that "there is little discretion involved in the position of Regional Director." Guillermety, who was dismissed by the PPD and has since instituted his own suit for reinstatement, testified that political affiliation is not a requisite for the position of Regional Director because anyone with an Engineering, Public Administration or Social Services degree can qualify for the position, and because the functions of the job are clearly and specifically set forth in the rules of the Agency. That anyone with a particular masters degree could qualify for a position seems to us to have little, if any, bearing on the question of whether political affiliation is appropriate. Moreover, that the functions of the job are clearly set forth does not mean that little discretion is involved in the job. In fact, those functions reveal a great deal of discretion.

At this stage of the proceedings, we think plaintiffs' position of Regional Director of CRUV is one for which, under *Elrod* and *Branti* and the case law of the lower courts, "party affiliation is an appropriate requirement for the effective performance" of the office. 445 U.S. at 518. In light of this conclusion, we need not decide whether the district court erred in finding that the plaintiffs would not have been fired but for their party affiliation.

V.

As a final matter, we note that the district court did not explicitly reach a contrary conclusion about the partisan nature of the position of Regional Director. Rather, it seems to have based its decision primarily on the fact that it had not been convinced that termination based on political affiliation is justified when the administration could invoke the "simple expediency of disciplining or removing an employee who fails to abide by an Executive Order which reflects the program of the Administration regardless of the employee's political affiliation."[13]

By requiring a government employer to terminate an unprotected employee only upon cause, the district court ignored the teachings of *Elrod*. In *Elrod*, the plurality scrutinized two government interests that were offered in defense of the patronage practice. The first interest was the "need to insure effective government and the efficiency of public employees." The defendants argued that employees not belonging to the party of the administration would lack the incentive to work hard and might be motivated to subvert the administration's efforts to govern effectively. 427 U.S. at 364. The plurality rejected this interest because, *inter alia*, less drastic means than political termination exist for serving this interest. "Specifically, employees may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist." *Id.* at 366.

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[13] We note that this is the same approach taken by the Puerto Rico Supreme Court. In *Colon* v. *CRUV* 84 J.T.S. 52 (P.R. 1984), the Court suggested that the plaintiff, although his functions were confidential in nature," could be removed only if he "turn[ed] his back on the requirements of his functions as a public servant." *Id.* at 21.

In contrast, the second articulated interest — the need for political loyalty so that the administration can carry out policies sanctioned by the electorate — was found valid by the plurality, as it might be applied to policymaking positions. In *Branti*, as we know, the Court subordinated resort to the policymaking and confidential labels to a more functional analysis. 445 U.S. at 518. When, therefore, a partisan termination is defended on this ground, there is no requirement that the employer wait for cause to dismiss an employee of a different party; rather, to insure that representative government not be undercut, these employees may be dismissed without cause. Otherwise, indeed, the *Elrod-Branti* exception would have no reason for being. The district court seemingly ignored this implication, accepting the expert's testimony that political affiliation may be appropriate but deciding that the interest could be served by dismissing employees when the employee acts in a manner obstructive of the administration.

We therefore hold that the district court abused its discretion in finding that the plaintiffs had shown a likelihood of success on the merits of their wrongful termination claim.

The grant of the preliminary injunction is reversed.

Appendix

Job Description for Regional Director

"1. Directs, plans and supervises the operational and administrative activities of the Region, such as: Accounting, Personnel and Occupation, Maintenance, Modernization, Community Labor. Management and Section 8.

2. Reviews and signs the reports submitted to the Central Office, HUD and other related agencies.

3. See [sic] to it that the norms and regulations are complied with in accordance to the philosophy of the Public Housing Administration and the HUD Federal Agency.

4. Arranges periodic meetings with supervisory personnel to counsel and inform as to changes in norms and regulations and/or new work guidlins [sic] and other matters.

5. Reviews, approves and signs the reports on rent changes, which are sent to the Federal Agency, Central Office of the Housing Department and other agencies; reports on Accounting purchase orders, disbursements, functional budgets of the Region and preliminary budget of maintenance works and others.

6. Attends, representing the Agency, to meetings with other government officers or civic leaders from the community in order to discuss and coordiate the implementation of Social Services, economics, health and other type of services offered topublic housing residents and programs of the Housing Department.

7. Drafts reports related to the work performed.

8. Drafts correspondence for the signature of the Associate Director and/or CRUV Executive Director.

9. Supervises and evaluates the Supervisors of the different sections attached to the Region.

10. Makes recommendations on personnel recruitment, dismissals, promotions, salary increases and other relations with the Region's employees.

11. Recruits necessary irregular personnel at the Region.

12. Receives and hears residents or general public in problematic cases which have not been solved at a lower level.

13. Performs periodic visits to the housing projects at the Region.

14. Attends periodic meetings with the Associate Director, to discuss problems related to the operations of the Region.

15. Offers recommendations to the Executive Director to improve the services rendered by the Program.

16. Arranges meetings with residents and/or organized groups in the community for the coordination of social activities.

17. Plans and organizes training for the Region's employees in coordination with the Training Committee.

18. Receives telephone calls to give or receive information related to the Region's operations.

19. Is responsible for the preparation and control of the functional budget of the Region.

20. Performs any task as assigned."

"Concurring follows"

ALDRICH, *Senior Circuit Judge, concurring*. As the writer of the panel opinion which is now reversed, I am not at all personally unhappy with this result. I can believe, too, that quite possibly we were too strict, so far as the present plaintiffs are concerned.

At the same time, with great respect to my brethren, I cannot but wonder if some parts of the present opinion read more like the, admittedly provocative, *Branti* dissent than the majority opinion. It is of course true that a change of party at the polls may be stimulated by "lackluster" performance, but this is the age-old excuse — or reason — for patronage. The proper balance is elusive. I worry about the court's broad, and I suggest, unnecessary, generalizations about "lackluster," and its complement "tough and aggressive." These are personal attitudes, far beyond party. Any employee outside of civil service can be discharged for lackadaisical performance. To what extent are there to be classifications where non-party membership is the equivalent?

I am particularly doubtful about invoking the Puerto Rico Personnel Act. Since I believe my court would be quick to

say that, from the constitutional standpoint, this act goes too far, how is it persuasive in some individual case though not in others? And, finally, is not the court overinclusive in categorizing "a privy to confidential information"? All sorts of low level employees may be mechanically privy. Surely ability to keep confidences should not be determined by party affiliation.

With the customary freedom of a judge speaking for himself to express his personal mind, I could hope that the Supreme Court might see fit to liberalize its *Branti* views, but, again with respect, I wonder, in the meantime, if my court's guidance may not have preceded it. In particular I agree with my brother Torruella's aspersions against the Seventh Circuit's decision in *Tomczak* v. *City of Chicago*, 765 F.2d 633 (7th Cir. 1985).

"Dissenting follows"

TORRUELLA, *Circuit Judge* (Dissenting). Although I realize that the majority's task in attempting to define when political affiliation is "appropriate" to a governmental task is not an easy one, I suggest that this burden has not been lightened by its refusal to give due weight to the most relevant reference available in this particular case. *See Colón* v. *CRUV*, 84 J.T.S. 52 (P.R. 1984).

Undoubtedly influenced by the inflated assertions of appellants regarding an alleged egregious volume of political discharge cases pending before the United States District Court for the District of Puerto Rico, the majority has been induced into granted *en banc* consideration with a view to laying down an all-encompassing rule that will easily resolve these controversies. Unfortunately, the subject of this special attention is a case which both procedurally and factually does not lend itself to such facile disposition. The majority's statement that the "'conclusions' and 'holdings' as to the merits of the issue presented are to be understood [only] as statements as to probable outcomes," *ante*, at 4, further emphasizes the inappropriateness of using this juncture for the purpose of laying down a pronouncement by an *en banc* court. More importantly, if this is a "tentative" holding,

the strained result is additional proof that it contributes little to providing concrete guidelines for future action by the district courts or by governmental administrators.

Although the opinion appeals to "common sense judgment," *ante*, at 14, I fail to see how a dispassionate observer can conclude that such a standard was applied herein if we consider that the *majority opinion reaches an opposite conclusion, regarding the same job classification and description, as was reached by three other judicial bodies, e.g.*, the Supreme Court of Puerto Rico, *Colón* v. *CRUV*, *supra*, the United States District Court for the District of Puerto Rico, and a panel of judges of *this* Court (opinion issued December 20, 1985). I do not believe that the present court has a higher claim to common sense than the three judicial bodies that preceded us in deciding this issue. Thus, the majority opinion not only fails to provide cogent guidelines for future action, but completely unsettles what little law was available to direct the district courts in this delicate area. Furthermore, the observance by the public of such a divergence of results can only cause an erosion of its confidence in the judicial process. *See* Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 20 Journal of the American Judicature Society 170, 183-185 (1936-37) (reprinting of an address delivered by Roscoe Pound in 1906 at the annual convention of the American Bar Association).

When all is said and done, the majority simply does not accept the holding in *Branti* v. *Finkel*, 445 U.S. 507 (1980). That case places a *heavy* burden on the side claiming "that party affiliation is an appropriate requirement for the effective performance of the public office involved":

> [U]nless the government can demonstrate 'an overriding interest...of vital importance' requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued employment.

Id. at 516. This is not a new rule, the Court in *Elrod* v. *Burns*, 427 U.S. 347, 362, 368 (1975), having indicated that "the

[governmental] interest advanced must be paramount," and that "cases of doubt [should be] resolved in favor of the [employee]." *See also Buckley* v. *Valeo*, 424 U.S. 1, 94 (1976). This high standard is overcome in the present appeal by reliance on the flimsiest of evidence and on *Branti*-discarded labels.

Notwithstanding *Branti's* stricture that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position," *id.* at 518, much of the majority's analysis continues to rely on such tokens. *Ante*, at 18-19 ("policymaking"), 22,23 ("confidential"), 24 ("policymaker," "confidential"). Even assuming *arguendo* the present-day relevance of these labels, the opinion's deference to Puerto Rico's Legislature in classifying the disputed position within those titles, *ante*, at 24, is particularly disconcerting considering its failure to grant equal treatment to the Supreme Court of Puerto Rico's interpretation of its law. *Ante*, at 17 n.9. *See Posadas de Puerto Rico* v. *Tourism Co. of Puerto Rico*, U.S. , 54 U.S.L. W. 4956, 4959 (July 1, 1986) (in deciding a First Amendment violation claim, the restrictive interpretation given by the Supreme Court of Puerto Rico to a local statute is entitled to "[a] rigid rule of deference...given the unique cultural and legal history of Puerto Rico." *Id.* n.6).

This case also sets bench marks in other respects. We now have "experts" in the field of "appropriateness of political affiliation." Although I would not have thought that this is a matter within the reach of Rule 702, Fed. R. Evid., I will, also *arguendo*, overlook this apparent technicality. It would seem, however, that such factual conclusions as were testified to by Dr. Hirshbrunner are nevertheless subject to the strictures of Rule 52(a) of the Civil Rules, which advises against the setting aside of a trial court's findings of fact, even in "granting interlocutory injunction[s]...[,] unless clearly erroneous." Rule 52(a), Fed. R. Civ. P. As stated by the original panel majority in this case in upholding the district court's findings, "By this time we need not dwell on the principle that the district court's findings of fact must stand unless clearly wrong." *Jimenez Fuentes* v. *Torres Gaztambide*, slip op. (Aldrich, J., December 20, 1985), at p. 4. Notwithstanding the clarity of this statement of principle, in view of the majority's actions I am obliged to remind it of the

additional wisdom provided by *Anderson* v. *City of Bessemer City, N.C.*, U.S. , 105 S. Ct. 1504, 1511-1513 (1985), also a discrimination case, in which the Supreme Court stated:

> [A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court... If the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.* This is so even when the district court's findings do not rest on credibility determination, but are based instead on physical or documentary evidence or inferences from other facts. ... Rule 52 'does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's finding unless clearly erroneous'.
>
> ...But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding if not internally inconsistently can virtually never be clear error.

Citations omitted, emphasis supplied.

The majority violates virtually every prescription in *Anderson*. Unless the original panel of this court was completely

misguided, I can state with some assertion that the evidence presented to the district court permits at least two plausible views of the evidence.

It is self-evident that the trial court rejected the "expert's" "opinion" on this matter, as well it might have in view of the facetious nature of this testimony. The "expert's " statement that there are ideological differences between Puerto Rico's two leading parties regarding the acceptance or non-acceptance of federal funds for public housing, *ante*, at 17, would lead any trier of fact sitting in Puerto Rico to question the reliability of such an assertion. *See* Junta de Planificación de Puerto Rico, *Informe Económico al Gobernador, 1984-85*, San Juan, Puerto Rico (1986), Tabla 19, "Transfers between Puerto Rico and the Federal Government... Fiscal Years 1972-85," p. A-19, column entitled "Rent subsidies."

The "expert's" conclusions regarding the need for political affiliation of the job description in question are equally incredulous. The Supreme Court of Puerto Rico, in considering this same position, with an almost identical job description, put it this way:

> It would be difficult to visualize that the faithful and efficient discharge of the duties of Director or General District Supervisor, as listed in OP-16 of the Personnel Office, in the public housing program, would require a determined loyalty to the ideological postulates of a given political party.

Colón, *supra*, at 3628. (My translation). I believe we would be on safe grounds to assume that Puerto Rico's Supreme Court is better qualified to reach this conclusion than appellant's "expert."

Yet, the majority avoids specifically ruling that the district court was clearly erroneous in not giving credibility to the "expert's" tailormade testimony. Of course, if we conclude that the issue of "appropriateness" is a legal one, then the district court had no business in even hearing Dr. Hirshbrunner's opinion, and we, even less in relying upon it as a basis for today's far reaching decision.

Although much is made of the ranking of the regional director's position within CRUV, the majority overlooks the real standing of that position in the hierarchy of the Department of Housing, the umbrella organization within which CRUV is but one of three divisions. Joint Exhibits I and II, reproduced as appendices to this dissent, establish that "regional director" is a bombastic title for a *fifth echeleon* government supervisor (their previous title), with *limited territorial and agency jurisdiction*. These, at least, are two distinguishing features from *Tomczak* v. *City of Chicago*, 765 F.2d 633 (7th Cir. 1985), in which the politically-discharged employee occupied the second highest job in a city-wide department. Other cases relied upon by the majority, *ante*, at 21-23, involve employees with agency-wide or statewide authority. The very testimony of plaintiffs Jiménez-Fuentes and Vicente Vázquez, cited as proof their "role as...policymaker[s]," *ante*, at 19-20, is in fact demonstrative of exactly the opposite: they were sent and told to do a job in a region, *i.e*, all they did was follow orders and policy established higher up.

Reliance on *Tomczak* in my opinion is not advisable. In addition to the factual distinctions already alluded to, I believe that a holding, which makes the dispensation of water a job in which political affiliation is an "appropriate" requirement for its effective performance, is a highly suspect ruling. I should point out that we shall be the first court outside the Seventh Circuit to even cite *Tomczak*.

Nor do I agree with the majority's labeling or analysis of the job description in this case as leading to a "common sense" conclusion that political loyalty is appropriate to a regional director's job. *Ante*, at 18-19. Important and relevant portions of that description have been overlooked. *See* Appendix, *ante*, at 28-30. For example, from paragraph 1 of those functions labelled "policy-making" by the majority, *ante*, at 18, is excluded the fact that the functions therein described merely deal with activities "such as: Accounting, Personnel and Occupation, Maintenance, Modernization, Community Labor, Management and Section 8." *Ante*, at 28. From the next paragraph included by the majority within that label, Paragraph 3, have been omitted those parts

dealing with the standard to be applied by the regional directors in monitoring compliance: "the philosophy of the Public Housing Administration and the HUD Federal Agency." *Ante*, p. 28. If we equate "philosophy" with "policy," the conclusion cannot be avoided but that a regional director *follows*, rather than establishes, public policy. The *discussion* of his region's operational problem with the associate director (No. 14), the *offering of recommendations* on improvement of the services to the Executive Director (No. 15), and the preparation and control of his Region's *functional* budget (No. 19), can only be labelled "policymaking" by a more expanded view of that term than has hereto been prevalent.[1] Requirement No. 15, "[p]erforms any task as assigned," is, if anything, illustrative of the subservient status of regional directors rather than an indication of their "policymaking" prerogatives.

I do not believe that it is necessary or productive to continue an indefinite discussion of the majority's analysis of the job description. A brief reading of the duties classified under the various headings ("Representative Functions," "Spokesperson Functions," "Personnel Duties," "Ministerial Duties"), *ante*, p. 19, reveals that these activities are similar to those carried out by a myriad of low and middle level government executives. If the performance of these functions are sufficient excuse for abrogation of their First Amendment rights under *Branti*, then this Court is opening the flood gates for the swinging of the patronage axe. This will be a judicial throwback to the days of the spoils system, when someone in a position like the regional directors, because they were party hacks responding to selfish partisan interests, could condition the granting of public aid to "appropriate" party affiliation by the recipient. This decision will hardly be a contribution by this court to good government to say nothing of the chilling effect that it will have on the exercise of the associational rights of the thousands of government employees who must now fear its impact.

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[1] *See Elrod* v. *Burns*, 427 U.S. 347, 368 (1976):

> In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of *broad* goals.

(Emphasis supplied).

This is an unfortunate decision. It is the wrong case, the wrong juncture in that case, and the wrong outcome. *Branti*, *supra*; *Anderson*, *supra*.

Politiae legibus non leges politiis adaptandae.

I dissent.

APPENDIX H

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 85-1655

ARNALDO JIMENEZ FUENTES, ET AL.,
Plaintiffs, appellees,

v.

HON. JAIME TORRES GAZTAMBIDE, ET AL.,
Defendants, appellants.

JUDGMENT

Entered: September 19, 1986

This cause came on to be reheard on petition for rehearing en banc.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court granting the preliminary injunction is reversed.

By the Court,
Francis P. Scigliano
Clerk.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1655

ARNALDO JIMENEZ FUENTES, ET AL.,
Plaintiffs, appellees,

v.

HON. JAIME TORRES GAZTAMBIDE, ET AL.,
Defendants, appellants.

Before

Campbell, *Chief Judge*,
Aldrich, Coffin, Bownes, Breyer and Torruella,
Circuit Judges.

ORDER OF COURT

Entered: October 21, 1986

Upon consideration of appellees' petition for rehearing,
It is ordered that said petition be and the same hereby is denied.

By the Court,
Francis P. Scigliano
Clerk.

APPENDIX J

Zaida Lydia De CHOUDENS, et al.,
Plaintiffs, Appellees,

v.

The GOVERNMENT DEVELOPMENT BANK
OF PUERTO RICO, et al.,
Defendants, Appellants.

No. 86-1059.

United States Court of Appeals,
First Circuit.

Sept. 19, 1986

As Amended Sept. 24, 1986.

Before CAMPBELL, Chief Judge, COFFIN, BOWNES, BREYER and TORRUELLA, Circuit Judges.

COFFIN, Circuit Judge.

Plaintiff-appellee Zaida Lydia De Choudens claims she was demoted from her government position on the basis of her political affiliation in violation of her first amendment rights. *See Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). In this companion case to *Torres Gaztambide v. Jimenez Fuentes*, No. 85-1655, slip op. (1st Cir. Sept. 19, 1986), we decide whether political affiliation was an appropriate requirement for plaintiff's position.

In both cases, federal district judges in the District of Puerto Rico had granted preliminary injunctions, requiring the

reinstatement of the plaintiffs to their governmental positions.[1] The plaintiffs, members of the Partido Nuevo Progresista (PNP), had been removed from their positions by officials from the Partido Popular Democratico (PPD), which won the November 1985 general election. In *Jimenez Fuentes*, we reversed the issuance of an injunction, concluding that the position at issue (regional director of a housing agency) resembled one where, because it involved policymaking, confidential, and spokesperson functions in an area responsive to a party's governmental goals, political affiliation was an appropriate requirement. In this case, we affirm the district court's grant of a preliminary injunction because, although the position at issue involves policymaking, the reposing of confidence, and communicating, we presently conclude that such functions are so remote from advancing or thwarting the agency's partisan-responsive goals that political affiliation would not be considered an appropriate requirement.

I.

Plaintiff served in the Puerto Rico Government Development Bank (Bank) for over twenty years. She rose from the position of accountant through eight career-level positions to Senior Vice President of the Finance Area. She was one of the three vice presidents, serving under the President and Executive Vice President. After the new administration assumed power in January 1985, defendant-appellant Jose Ramon Oyola[2] was appointed president of the Bank. In April 1985, Oyola notified plaintiff that she was being "separated" from her position of trust and reinstated to a career position.

II.

Defendants claim that the district court abused its discretion in finding that plaintiff had shown a likelihood of success on the merits. Although they do not concede that plaintiff was transferred for political reasons, they do not challenge that finding.

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[1] After the court voted to vacate the original panel decision in *Jimenez Fuentes* and hear that case en banc, we voted to hear argument in this case en banc at the same session, without the assistance of a panel decision.

[2] The other defendants-appellants are the Bank and its seven directors.

They do challenge the district court's findings that the plaintiff would not have been transferred but for her political affiliation, and that her position was not one for which political affiliation was appropriate. We address these asserted errors in turn.

As in *Jimenez Fuentes*, we preface our discussion by noting that our standard of review is whether the issuance of the injunction constituted an abuse of discretion, *id*: at 3, and that our conclusions at this juncture are to be understood as statements as to probable outcomes, *id*. at 4.

A.

[1] The first issue is whether the district court abused its discretion in ruling, pursuant to *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1974), that defendants failed to show that they would have demoted plaintiff notwithstanding her political affiliation. *See Rosaly v. Ignacio*, 593 F.2d 145, 149 (1st Cir.1979). Defendants on appeal face an uphill task because their sole witness was Oyola, the new PPD president of the Bank. Although they introduced much documentary evidence, their *Mt. Healthy* defense rested upon Oyola's credibility.

Oyola stated that he demoted plaintiff because he deemed her incompetent, providing four reasons for his conclusion. First, she had "very bad" relations with the personnel she supervised, based on comments made by union officials. But Oyola spoke of these comments in conclusory terms, and did not know the eventual outcome of the complaints against her. In fact, the few grievances carried to a conclusion largely, if not completely, vindicated plaintiff and the Bank. A union resolution censoring plaintiff may well have arisen from an institutional position taken by the Bank in its labor negotiations.

A second proferred reason was inadequate internal controls in the food stamp division, which made possible a substantial theft of food stamps by several employees who were later convicted. While some audit reports were critical of various Bank procedures, commendations later followed, and it was plaintiff herself

who apparently instituted the lengthy investigation that lead to the apprehension of those responsible. Moreover, the district court might well have been skeptical of this reason in light of the fact that the official (a PPD member) in direct charge of the food stamp operation at the time of the thefts was assigned plaintiff's duties after her removal.

A third ground was plaintiff's alleged delinquence in failing to supply enough accounting personnel to service a high-risk private loan program. But evidence showed that plaintiff recognized the problem and obtained temporary outside help. Oyola's fourth and final reason for demoting plaintiff was that she had failed to put into operation a computerized loan-administration system. Although the needed software had been acquired but was not in use, the court found that employees in a division outside the plaintiff's area had not yet developed the files or technique to use it.

In addition to considering the conflicting evidence and inferences relating to the four proffered reasons for demoting plaintiff, the district court was entitled to take into account the following circumstances. Shortly after Oyola took office, the new Secretary of Justice asked to see all files of employees in positions of confidence, including plaintiff's.[3] Subsequently, the Secretary reported his belief that all were indeed positions of confidence, removable at will. Notwithstanding this report, Oyola stated that he removed the three Senior Vice Presidents because of their incompetence. He professed not to know that they were PNP members. Moreover, at no time during the two months preceding plaintiff's demotion did Oyola talk with her or her supervisors about her work or its shortcomings.

In short, we cannot fault the court for finding Oyola not credible. And the various documents are not so clear and compelling as independently to make the case against plaintiff. We therefore find that the district court did not abuse its discretion in finding that plaintiff would not have been demoted "but for" her political affiliation.

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[3] Plaintiff's position was a confidential position under the Puerto Rico Public Service Personnel Act of 1975, 3 L.P.R.A. § 1301 et seq. (1978). *See Jimenez Fuentes*, slip op. at 22-23.

B.

[2] Defendants' remaining basis for prevailing on this appeal is their argument that the district court abused its discretion in holding that defendants failed to meet their burden, under *Elrod* and *Branti*, of showing that political affiliation is an appropriate requirement for the position at issue. Rather than recite again our observations as to the relevant authorities and our resulting guidelines of analysis, we rely on our opinion in the companion case, *Jimenez Fuentes*. We do find, however, one proposition worth repeating:

"A threshold inquiry, which derives from *Branti*, involves examining whether the position at issue, no matter how policy-influencing or confidential it may be, relates to 'partisan political interests....[or] concerns.' 445 U.S. at 519. That is, does the position involve government decisionmaking on issues where there is room for political disagreement on goals or their implementation. Otherwise stated, do party goals or programs affect the direction, pace, or quality of governance."
Jimenez Fuentes, slip op. at 12.

We begin by scrutinizing the Bank itself. Although the district court focused primarily on plaintiff's position in the Bank, it did note the Bank's role as advisor and fiscal agent of the government of Puerto Rico. The court commented on the Bank's need for continuity of organization (fostered by the directors' staggered four-year terms), as well as its need for financial stability and strength. It stated that "to subject this financial institution to the influence peddling and cronyism that patronage brings will erode its very foundation." This was dictum, unnecessary to the court's determination that political affiliation was an inappropriate requirement for plaintiff's position, and we think probably overbroad as applied to the other, more politically-sensitive positions at the Bank.

As of 1984, the Bank had nearly four billion dollars of assets, and some three hundred employees. Its three primary functions are: fiscal agent and financial advisor to the Commonwealth and its Governor, its agencies, municipalities, and public corporations; lender to government and private industry; and depository of Commonwealth funds. The Bank's Annual Report spoke of its

"Group," including its subsidiaries and affiliates, as providing "leadership in promoting renewed economic growth"; a "multifaceted, yet coordinated approach to development, which, during fiscal 1984, emphasized commercial, industrial, agroindustrial, tourism, and human resource development"; increased allocations of loans to encourage new investment in hotels, to spur agricultural exports and manufacturing; and a redirection of the Puerto Rico Development Fund to serve small business. Oyola, representing the new administration, testified that he had been given "a clear policy direction ... to create a Development Bank out of the [Bank]" to engage in innovative private financing of each and every organization of the Commonwealth of Puerto Rico.

To us, these seem like indicia of legitimate partisan goals for government operations, not far removed from some of the policy objectives of CRUV discussed in *Jimenez Fuentes*. This, however, need not detain us long for there remains the critical inquiry: even assuming that the Bank's strategic leadership positions are ones for which political affiliation is an appropriate requirement, is plaintiff's position within this group? Defendants, of course, most emphatically endorse the concept of the Bank as an instrument of public policy responsive to a new administration's economic development goals and underscore the district court's statement that it had "no quarrel with [defendants'] contention that [plaintiff] is a policymaker and has access to confidential information within the bank." This, to defendants, is the end of the quest.

So it was in *Jimenez Fuentes* where plaintiffs, regional directors of a public housing corporation, were top "line officers" or proconsuls for their agency within their region, representing the agency in all respects. Each region was a microcosm of the larger agency, and the duties of each regional director were representative of the duties of the agency's executive director. The instant case, however, presents us with a staff official who, while indubitably in a policymaking, confidential, and communicative position, is both empowered and constrained by the limits of her specialized functions. Because her division is not a microcosm of the larger agency, it is insufficient to show that she is a

policymaker for a Bank that involves partisan political concerns. *Elrod* and *Branti* require us to examine whether political affiliation is an appropriate requirement for plaintiff's particular position.

We now paraphrase the district court's findings, which we find amply supported, regarding the plaintiff's position. Plaintiff heads one of the Bank's three main operation areas, the Finance Area, the other two divisions being the Investment, Treasury and Public Financing Area and the Private Financing Area. The Finance Area's main function is the offering of accounting services to the Bank's other areas and dependencies. It keeps accounting records on the Bank's operations and services other government agencies' accounts with the Bank. It also acts as advisor to government agencies on accounting matters.

Within the Finance Area are: the Controller Division, which maintains and updates the Bank's internal systems and procedures to ensure that there are adequate internal controls acceptable to outside examiners; the Budgeting and Control Division, which examines the Bank's proposed disbursements to ensure that they are made in accordance with the approving authority; the Fiduciary Unit, which monitors the payment of the central government of Puerto Rico's public debt and maintains accounting records for the central government's sinking fund; the Accounting Division, which maintains accounting records of the public and private sector loans and prepares monthly and annual statements; the Current Accounts Division which is in charge of the Secretary of the Treasury of Puerto Rico's account and the payment of central government checks issued by that department and other agencies; the Government Accounts Service Division, which complements the Currents Account Division in serving all government accounts; and the data processing activities, which include three divisions responsible for all the computerized data services.

As Vice President of the Finance Area, plaintiff was in charge of planning, coordinating, directing, and supervising these divisions. She was also a member of the Bank's Loan Committee and she sometimes acted as interim President. Plaintiff testified that she gave advice to the President and the Board of Directors on financial matters within her area.

Keeping in mind the district court's findings of an admittedly broad range of duties, we have scrutinized defendants' brief and record references for evidence of the relationship between plaintiff's position and those strategy decisions that the leadership of the Bank might make in response to a new governor's administration in Puerto Rico. Defendants cogently point to the broad discretion lodged in the Senior Vice President for the Finance Area, the power to make rules and recommend reorganization, the oversight of accounting policy, a contribution to investment strategy, budget and personnel recommendations, and software advice. While these responsibilities signify a position of substance, of valued policy contributions, recommendations, and advice, they involve politically-neutral, technical, and professional matters. Similarly, though plaintiff was indeed an agency spokesperson, there is no suggestion of any "party line" or political, goal-oriented message that she ever communicated.

What did pique our interest was the power, delegated on occasion, of plaintiff to act as president of the Bank, because this responsibility might overleap the normal technical boundaries of plaintiff's position. Our review of the record reveals only the following occasions when she acted as president: when the President informed her of the Bank's position; when she made no decision; when she commenced the budget presentation to the Board of Directors because the President was late; when she gave a technical reason to the Board for holding up a loan disbursement;[4] and when she acted only after calling the President for instructions.

In order to carry their burden of demonstrating the politically-sensitive nature of the position at issue, defendants relied on Oyola to identify where and how a person in plaintiff's position might help or hinder the pursuit of the Bank leadership's strategic goals. He stated that the Finance Area was the most

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[4] The background of this presentation was that the Board of Directors had passed two or three resolutions regarding the loan in question. Technical difficulties had arisen, and it was not clear that the Board wished to take a second-mortgage position subordinate to a private bank. Plaintiff could not discern the Board's intent from the minutes and "had to go back to the board and ask them." This indicates to us the dominant policymaking status of the Board on approving loans and the purely technical role of plaintiff's position.

important of the Bank's three areas for the "internal work" of the Bank to ensure "the proper flow of work." He added that it was important "to have the same views of what the accounting system should be...." Not only did Oyola admit that he did not know what plaintiff's ideas were on such matters, but it seems clear to us that however broadly "partisan" may be defined, it cannot encompass these technical, professional criteria. And, although defendants allude to plaintiff's part in administering the loan portfolio, Oyola's testimony reveals that plaintiff's involvement consisted of accounting advice.

The district court concluded:

> "The area which plaintiff previously directed is precisely that part of the institution entrusted with safeguarding its bank operations in the strict sense of the word. The Finance Area is essentially a provider of accounting services and technical, financial information to give other areas of the Bank the necessary input to make their decisions. Whatever characteristics of plaintiff's former position could arguably be related to a partisan political interest are so insubstantial when considered in the context of her overall functions that they do not outweigh her First Amendment right to political affiliation."

At this juncture, based on the evidence before the district court, we cannot find any abuse of discretion. We recognize the closeness of a case involving the political firing of a top policymaking official in a public agency. It may well be that in any further proceedings on a permanent injunction a sufficient nexus will be drawn between the position at issue and the kind of policy relating to partisan concerns. At the moment, however, we cannot fault the district court for not seeing it.

The district court's issuance of a preliminary injunction is affirmed.

TORRUELLA, Circuit Judge (concurring).

Although I agree with the conclusion of this appeal, to the extent that it relies on the reasoning of the *en banc* opinion issued today in *Jiménez Fuentes, et al. v. Torres Gaztambide, et al.*, No. 85-1655, slip op. (1st Cir. Sept. 19, 1986), I cannot but concur in its outcome. I also am in disagreement with the *en banc* attention given to this case *sans* the normal procedure of panel consideration having been previously accorded. I see nothing in this case which warrants such expedited treatment.

APPENDIX K

IN THE SUPREME COURT OF PUERTO RICO

Juan Hermán Colón *et al.*,
Plaintiffs and appellants

v.

No. R-84-29*
Review

Urban Renewal and Housing Corporation
Defendant and appellee

MR. JUSTICE NEGRON GARCIA
delivered the opinion of the Court.

San Juan, Puerto Rico, June 4, 1984

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*Cited at 115 D.P.R. 503 (1984)

Our Constitution "recognizes the right to have different ... and conflicting political ideas, without this difference or conflict being a negative or positive factor in any person's relations with the State." *Diario de Sesiones de la Convención Constituyente* 2562, Equity ed. (1961). In order to approach that constitutional idea, it is time that administrators, appointing authorities, and mayors understand that the Judicial Power shall not tolerate politico-partisan discrimination or unlawful dismissals.

I

This appeal stems from a complaint filed by Juan Hermán Colón, César Rivera Flores, and Luis R. Castañeda, for their allegedly unlawful dismissal from their positions in the Urban Renewal and Housing Corporation (URHC) in 1973.

A brief background of the public career of these officers is in order. According to the findings of the learned trial court, in 1954 Colón began to work with the Ponce Housing Authority, which was absorbed into the URHC. In 1969, he worked as Accountant III, with a monthly salary of $525.00. That year, he was appointed Ponce District Manager, with the position of Housing Administration Executive. Castañeda began working in URHC on September 1, 1963, and in 1969 was Accountant III in Humacao. He earned $550.00 monthly. On August 1, 1969, he was appointed Executive Officer VI, General District Supervisor. Rivera Flores was an Agronomer IV in the Noncompetitive Service, within the Department of Agriculture. He then earned $650.00 monthly. On September 16, 1971, he was appointed as Manager or General District Supervisor for the Caguas Office of URHC. These three persons were publicly identified with and were active members of the New Progressive Party (N.P.P.). Under that governmental administration they were directly appointed by the then Executive Director of URHC, Mr. Miguel Santiago Meléndez.

The Personnel Regulations of the URHC in force at the time these appointments were made, classified the position of General District Supervisor as confidential. An amendment introduced by the Board of Directors on October 24, 1972 to classify such positions as "regular or career" was subsequently declared null.

The composition of the Central Administration changed in

1973. The new Secretary of Housing named Ismael Ríos Sánchez, and Mrs. María L. Guerra as Associate Director of the Housing Administration Program. During January and February, Ríos Sánchez met with each of the plaintiffs. He told them that he was going to appoint "persons of trust" to the position of General District Supervisor. He offered Colón and Castañeda regular positions in the agency equal to the positions they previously held. Both rejected the offer because of the salary reduction the same would represent. Rivera Flores, who previously held no position in URHC — he came from the Department of Agriculture — stated his plans of returning to the private sector. Under the premise that such positions were confidential, they were dismissed. Allegedly, they were eventually substituted by persons identified with the Popular Democratic Party (P.D.P.).

They appealed to the San Juan Superior Court, questioning the legality of that decision. The trial court concluded that the services rendered by plaintiffs were those rendered by confidential employees, hence, the summary dismissal was valid. We issued an order to show cause in order to examine said judgment.

II

It is clear that at the time when appellants were named District Managers, the URHC Personnel Regulations contained a procedure for the recruitment of *career* personnel. It required persons to take and pass entrance and promotion tests for the different positions; it also established a list of eligibles. None of the plaintiffs appellants went through that process. Their appointments were direct. That procedure, together with the nature of their functions, tends to sustain the conclusion that they were confidential employees. In view of that situation we would not ordinarily intervene with the decision of the trial court dismissing the complaint.

Now then, the reason inferred by Executive Director Ríos Sánchez for their substitution, that is, to recruit persons of his trust to execute his orders or instructions, is of little juridical and persuasive value. The appellants inferred that it really was due to political discrimination. The evidence and circumstances present herein move us to agree. It was stipulated that "plaintiff's administrative ability was never in controversy or was it ever a det-

rimental factor in the decision."[1] The allegation that they were replaced by members of a different party creates a strong inference that this was the real motive. In these circumstances, it is justified to conclude, through the preponderance of the evidence, that there was political discrimination. *Navedo* v. *Municipio de Barceloneta*, 113 D.P.R. 421 (1982); *Báez Cancel* v. *Mayor Mun. of Guaynabo*, 100 P.R.R. 980 (1972). They were entitled to have their cause of action weighed under the doctrine stated in *Ramos* v. *Srio. de Comercio*, 112 D.P.R. 514 (1982). To such effects, although their functions were confidential in nature, we note that the appointing authority has not been able to show that the political affiliation was an appropriate requirement for the discharge of the public office in question. We are not surprised. We do not see that the faithful and efficient discharge of the duties of a District Manager or General Supervisor, as listed in OP-16 of the Personnel Office,[2] of a public housing program requires a given loyalty to the ideological axioms of a political party. Such a preference is not necessarily a valid criteria for being either the person entrusted with implementing that social program's

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[1] The lack of the administrative ability necessary for a position; or carelessness, inefficiency or lack of discipline in the discharge of such functions, would be grounds to validly dismiss a confidential employee.

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[2] It read:

"1. Plan, organize, assign, and supervise all operational and administrative activities in the district, such as: social services and Community Work offered to residents, selection and occupation of housing, accounting, and maintenance of district projects. "

"2. Revise and sign all reports rendered to the Central offices of the Housing Program related to different stages of work in the district. "

"3. See to it that all the norms and regulations are complied with and implemented in accordance with the policies of the Housing Program. "

"4. Inform and advise district personnel on any changes in the norms and regulations. "

"5. Revise and approve all reports concerning changes in rent, reports rendered to the federal agency, other government agencies and the central offices; accounting reports, purchase orders, disbursements, requisitions, preliminary budget of regular and special maintenance work, and the opera-

policies, or the recepient of such benefits. The only clear way to approach any application should be the need for housing and any other deserving factors of the case. Political affiliation is foreign to the process of eligibility. The following pronouncement is applicable:

[W]e may reasonably conclude that the hiring authority (the government) must bring evidence to show that the employee's particular political affiliation is an "appropriate requirement" for

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tional budget of the district and any other report concerning the different operational stages in the district. "

"6. Appear in representation of URHC in meetings with other governmental officers or civic leaders in the community, with the purpose of discussing and coordinating the implementation of social, economic, and health services, etc., offered to residents of public housing. "

"7. Draft reports, in English or Spanish, to be submitted to the Program's Central Offices, the Executive Director, other governmental agencies, the governor's office, etc. "

"8. Draft correspondence, in English or Spanish, for his own signature, and for the signature of the Program's Associate Director or the signature of the Executive Director. "

"9. Make recommendations on personnel recruitment, dismissals, salary raises and other matters related to the District employees. "

"10. Receive and attend to residents or the general public, in cases that pose difficult problems that could not be settled at a lower level. "

"11. Carry out periodical meetings with his supervisory personnel to advise them on changes in norms and regulations, notify new work guidelines, evaluate the work carried out, and establish work priorities and other related priorities. "

"12. Make frequent visits to district housing projects to make sure that their operations are adequate. "

"13. Hold periodic meetings with the Housing Program's Associate Director to discuss complex problems related with District operations. "

"14. Attend all telephone calls to receive or give information concerning District operations. "

"15. Carry out any other special task assigned."

the effective discharge of the public office in question; that is to say, the Government must establish the existence of government interests that rank above the employee's rights under the First Amendment.

In the case at bar, the Government failed to establish this. *Ramos*, *supra* at 516.

On the other hand, the highly charged political climate that unfortunately prevails in our country and permeates all governmental functions prevents us from discarding the possibility that, in a specific case, an employee not affiliated with the political party in power may turn his back on the requirements of his functions as a public servant. If the situation should arise, the determination as to the validity of his removal or dismissal should be made while taking into consideration, among other circumstances — and aside from the fact that he may be a confidential employee — the opportunity that he has had under the new administration to show, within a reasonable term, that his competence, efficiency, and loyalty to public service axioms have not been affected and are above his personal political preferences.

III

The courts must break the trend and vicious circle established on the island, of substituting government personnel, after each general election, on grounds foreign to a sound public administration; the political patronage and spoils system. *Olivieri Morales*, *supra*. The scenario recurs each time there is a change in the political party in power. The adverse consequences are fatal and alarming: the reduction in funds is substantial. It is a judicially recognized fact that payment of these types of judgments results in a financial crisis and have a negative impact on the budget. It constitutes a substantial detouring of public funds in detriment to the essential public services, independently from the recipient's political affiliation. The courts must exhaust all resources to design dissuasive remedies.[3]

On the grounds cited above, judgment shall be rendered reversing the judgment of the San Juan Superior Court of October 19,

[3] The situation is critical and calls for an urgent remedial judicial creativity.

1983, and declaring the removals null. When said court provides the compensation for back pay it shall make the corresponding deductions for salaries, taxes, social security, retirement, and others. See *Estrella* v. *Mun. de Luquillo*, 113 D.P.R. 617 (1982); *Municipio de Mayaguez* v. *Rivera*, 113 D.P.R. 467 (1982). It shall also deduct whatever other amounts are proper in the particular circumstances of this case.

The case is remanded to the trial court for further proceedings consistent with this opinion.

In this case the trial court dismissed the complaint. The complaint was brought solely against URHC and the officers, in their official capacity, not personally. For such reason, said forum did not draw any findings as to whether or not they acted in bad faith and with total disregard for the constitutional and civil rights, nor did it provide other remedies, question on which we need not pronounce ourselves at this time.

JM/ba

CHIEF CLERK'S CERTIFICATE

I, Lady Alfonso de Cumpiano, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the annexed document is a photocopy of the official translation from Spanish into English (said translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by this Court on June 4, 1984, in case No. R-84-29, *Colón et al.* v. *Urban Renewal and Housing Corp.*, the original of which, in Spanish, is under my custody in this Office.

IN WITNESS WHEREOF, at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court in San Juan, Puerto Rico, this 3rd day of September 1985.

Lady Alfonso de Cumpiano
Chief Clerk
Supreme Court of Puerto Rico

APPENDIX L

PUERTO RICO PUBLIC SERVICE PERSONNEL ACT SECTIONS 2.1 AND 2.2, AS AMENDED, 3 L.P.R.A. 1311 TO 1312

3 L.P.R.A. § 1311. Public policy—Contents

The public policy of the Commonwealth of Puerto Rico with regard to the public service personnel is as hereinbelow set forth:

(1) To establish merit as the principle that shall govern the entire public service, so that it is the fittest who serve the Government and that every employee be selected, trained, promoted and retained in his employment in consideration of his merit and ability, without discrimination by reason of race, color, sex, birth, age, origin or social condition or political or religious ideas.

(2) To the end of assuring the extension and strengthening of the merit principle to all sectors of the Puerto Rican public service, all public employees, whether they are commonwealth or municipal employees with the exception of those excluded in section 1338 of this title, shall be covered by a single personnel system, established to enforce the merit principle, which shall be known as the Public Service Personnel System.

(3) To establish a Personnel Administration System conceived, structured and administered consistently with the participation of the employees, including collective bargaining, and with an internal dynamics that may permit and encourage its continuous self-renewal.

(4) The Personnel Administration system shall be divided into the Central Administration, which shall be under a Central Personnel Administration Office, and the Individual Administrators mentioned in this chapter.—Oct. 14, 1975, No. 5, p. 720, § 2.1.—Amended July 17, 1979, No. 1, p. 901, § 1, eff. July 17, 1979.

3 L.P.R.A. § 1312. —Objectives

Through the application of the public policy above stated, it is sought to attain as a goal the highest levels of excellence, efficiency and productivity in the public service, by achieving the following objectives:

(1) To attain that the public administration be governed by criteria of the utmost uniformity, equity and justice.

(2) To maintain a climate of harmony and satisfaction in the work, that may redound in a high degree of motivation and spirit of service among the employees.

(3) To maintain the continuity and regularity in the rendering of public services.

(4) To attain as a maximum aspiration the rendering of public services that may tend to attain and assure the continuous socioeconomic development of Puerto Rico, the highest degree of social justice and the full enjoyment of the rights consecrated in the Bill of Rights of our Constitution.

(5) To assure that the government has adequate means, through the wise and restricted use of the confidential service, to implement the public policy validated by the majority at the same time that the career service is protected as a basic institution of the public service.

(6) To offer to the employee, mechanisms of participation that may tend to attain a climate of harmony and efficiency.

(7) To offer equal employment opportunity to persons who are socially, culturally or economically disadvantaged and to minority groups.—Oct. 14, 1975, No. 5, p. 720, § 2.2.—Amended July 17, 1979, No. 1, p. 901, § 2, eff. July 17, 1979.

APPENDIX M

PUERTO RICO PUBLIC SERVICE PERSONNEL ACT SECTION 5.3, AS AMENDED, 3 L.P.R.A. 1343

3 L.P.R.A. § 1343. Individual Administrators

The following agencies shall be Individual Administrators:

All agencies which are at present in the exempt or noncompetitive service. The following shall likewise be Individual Administrators:

(1) Every standing committee, or any committee created for an indefinite period to consider specific situations or to carry out special studies.

(2) Each of the municipalities of the Commonwealth of Puerto Rico.

(3) Every agency included by special law in the exempt or noncompetitive service, pursuant to the provisions of Act No. 345 of May 12, 1947, as amended, known as the Personnel Act, or of special laws.

(4) Teaching personnel of the Department of Education.

(5) Police of Puerto Rico.

(6) Planning Board.

Every subdivision or program of any agency not included in the preceding list, which by special law may have been included in the exempt or noncompetitive service pursuant to the provisions of Act No. 345 of May 12, 1947, as amended, known as the Personnel Act, or of special laws, shall be considered as part of the agency for the purposes of constituting a single Individual Administrator, or to belong, as a whole, to the Central Administration, as the case may be.—Oct. 14, 1975, No. 5, p. 720, § 5.3; June 7, 1977, No. 49, p. 105, § 3, eff. June 7, 1977.

(8) The International Banking Center Regulatory

Board.—Amended July 2, 1980, No. 16, p. 911, § 25, eff. July 2, 1980.

(9) The Office of the Commissioner of Financial Institutions.—Amended Oct. 11, 1985, No. 4, p. 919, § 22, eff. Oct. 11, 1985.

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*This section, as amended in 1980, contained no subsection (7).

APPENDIX N

PUERTO RICO PUBLIC SERVICE PERSONNEL ACT SECTIONS 5.9 TO 5.11, AS AMENDED, 3 L.P.R.A. 1349 TO 1351

3 L.P.R.A. § 1349. Services and categories

There shall be two services: career and confidential; therefore there shall be career employees and confidential employees. The Director shall issue the general standards that will govern the confidential service personnel administration throughout the Personnel System.

3 L.P.R.A. § 1350. Confidential employees

Confidential employees are those who intervene or collaborate substantially in the formulation of the public policy, who advise directly or render direct services to the head of the agency, such as:

(1) Officers appointed by the Governor, their personal secretaries and drivers; as well as their executive and administrative assistants who answer directly to them.

(2) Heads of agencies, their personal secretaries and drivers; as well as their executive and administrative assistants who answer directly to them.

(3) Assistant heads of agencies and their personal secretaries and drivers.

(4) Regional directors of agencies.

(5) Personal secretaries and drivers of officials selected by popular election as well as their assistants who answer directly to them.

(6) Members of boards or standing committees appointed by the Governor and their respective personal secretaries.

(7) Members and personnel of boards or commissions appointed by the Governor having a specific period of effectiveness.

(8) Personnel of the offices of the Puerto Rico Ex-Governors.

Confidential employees shall be of free selection and removal. Likewise confidential shall be those employees who though of free selection may be removed only for good cause by provision of law or those whose appointment is for a term pre-fixed by law.

Every regular employee in a career position who is appointed to a confidential position shall be entitled to be reinstated in a position equal or similar to the last one he held in the career service.

3 L.P.R.A. § 1351. Confidential positions, approval

(1) Each agency shall present for approval of the Office a plan containing the confidential positions by which it desires to operate. In the case of municipalities, the Municipal Assembly shall follow the ordinance or resolution approving the plan submitted by the mayor and shall send it to the Office for the sole purpose of ascertaining that the provisions of section 1350 of this title have been complied with.

(2) The Office shall only intervene to determine if the plan on confidential positions complies with the provisions of section 1350 of this title.

(3) The Office may not approve more than 25 confidential positions for the same agency, except for those that due to their organizational structures, functional complexity or size require a larger number of confidential positions for their efficient operation.

(4) Any agency interested in increasing or reducing the number of confidential positions shall submit the plan to the Office, which shall intervene only for the purposes of seeing that the criteria established by section 1350 of this title are complied with.

APPENDIX O

PERSONNEL REGULATIONS OF THE URBAN RENEWAL AND HOUSING CORPORATION (CRUV)
(Translation.)

SECTION 4.2:

"The trust and confidence service will include the following types of function:

1. Formulation of public policy.

   This function will include the responsibility, direct or delegated, for the adoption for standards or norms for program content, eligibility criteria, agency operations, relations outside the agency, and other essential aspects for the management of programs or agencies. It will also include the participation, to a substantial and effective degree, in the formulation, modification or interpretation of those functions in the administration or for direct counseling to the agency head, through which the employee can effectively influence public policy.

2. Direct services to the Agency head that require a high degree of personal trust.

   The element of personal trust in this type of service is indispensable. The nature of the work corresponds essentially to the career service, but the personal trust factor is prevalent. The work can include secretarial services, the keeping of confidential files, automobile driving, and other similar tasks. In this type of job there is always present the elements of confidence, trust and security in relation to persons, programs or public functions.

3. Functions whose trust and confidence nature is established by Law.

The incumbent of a position assigned such functions, though of free selection, can only be removed based on the causes established by the law that created the position, and its tenure will extend through the full term of nomination, according to said law."